A/59/40 (Vol. II)

United Nations

Report
# of the Human Rights Committee

Volume II

Seventy-ninth session
(20 October-7 November 2003)
Eightieth session
(15 March-2 April 2004)
Eighty-first session
(5-30 July 2004)

General Assembly
Official Records
Fifty-ninth session
Supplement No. 40 (A/59/40)

General Assembly
Official Records
Fifty-eighth session
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United Nations • New York, 2004

NOTE

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VIEWS OF THE HUMAN RIGHTS COMMITTEE UNDER ARTICLE 5, PARAGRAPH 4, OF THE OPTIONAL PROTOCOL TO THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS

A. Communication No. 712/1996, *Smirnova v. Russian Federation* (Views adopted on 5 July 2004, eighty-first session)*

Submitted by:	Yelena Pavlovna Smirnova (represented by counsel, Mrs. Karina Moskalenko)
Alleged victim:	The author
State party:	Russian Federation
Date of initial communication:	19 June 1996 (initial submission)

The Human Rights Committee, established under article 28 of the International Covenant on Civil and Political Rights,

Meeting on 5 July 2004,

Having concluded its consideration of communication No. 712/1996 submitted to the Committee on behalf of Yelena Pavlovna Smirnova under the Optional Protocol to the International Covenant on Civil and Political Rights,

Having taken into account all written information made available to it by the author of the communication and the State party,

Adopts the following:

Views under article 5, paragraph 4, of the Optional Protocol

1. The author of the communication is Yelena Pavlovna Smirnova, a Russian citizen, born in 1967.[1] She claims to be a victim of a violation by the Russian Federation of articles 9 and 14 of the Covenant. She is represented by counsel.

The facts as presented by the author

2.1 On 5 February 1993, criminal proceedings were initiated against the author under article 93 (a) of the Russian Criminal Code, in relation to allegations that she had defrauded a

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* The following members of the Committee participated in the examination of the present communication: Mr. Abdelfattah Amor, Mr. Prafullachandra Natwarlal Bhagwati, Mr. Franco Depasquale, Mr. Maurice Glèlè Ahanhanzo, Mr. Walter Kälin, Mr. Ahmed Tawfik Khalil, Mr. Rajsoomer Lallah, Mr. Rafael Rivas Posada, Sir Nigel Rodley, Mr. Martin Scheinin, Mr. Ivan Shearer, Mr. Hipólito Solari Yrigoyen and Mr. Roman Wieruszewski.

Moscow bank by seeking to obtain credit on security of an apartment that did not belong to her. The author did not learn of the criminal proceedings against her until 14 September 1994, when she was arrested by officers of the Moscow police. She was released after 36 hours.

2.2 On 26 August 1995, the author was again arrested and detained in the pre-trial detention centre of Moscow's Butyrskaya prison. She was not officially advised of any charges against her until 31 August 1995, and was not promptly provided with the assistance of legal counsel. It appears from the enclosures that despite several requests, counsel was not allowed to see the author until 2 November 1995.

2.3 According to the author, her arrest and detention were unlawful because she was taken into custody after the expiration of the designated period for the completion of a preliminary investigation. She explains that under Russian criminal procedure, a suspect can be arrested only pursuant to an official investigation. In the author's case the investigation began on 5 February 1993 and expired on 5 April 1993, pursuant to article 133 (1) of the Code of Criminal Procedure. Article 133 (4) of the Code allows for a one-month extension of suspended and resumed investigations. Pursuant to this article, the preliminary investigation in the author's case was extended six times, three of which illegally, as acknowledged by the Municipal Prosecutor.

2.4 On 27 August 1995, the author submitted a complaint to the police investigator contesting the legality of her arrest and detention pursuant to article 220 (1) of the Code of Criminal Procedure. The investigator did not refer the complaint to the Tver inter-municipal Court until 1 September 1995, in violation of the requirement that such complaints be submitted to a court within one day. The author states that the Court dismissed the complaint on 13 September 1995 without having heard any argument from the parties, on the ground that it was not competent to review the legality of the arrest and detention since the investigation in the case had been completed. Yet this was the basis of the author's claim that her arrest had been unlawful. The author submits that the Court should have heard her case, because in reality the investigation had been extended and was ongoing, albeit, as the author contends, unlawfully. The author was unable to appeal against the decision of the Court, as article 331 of the Code of Criminal Procedure did not allow for an appeal against a decision in relation to a claim brought under article 220.

2.5 The author states that, as of the date of her first communication, no trial date had been set and that the Court had announced that her case would not be scheduled until September 1996. According to the author, this constituted a violation of article 223 of the Code of Criminal Procedure, which guarantees the designation of a trial date within 14 days of the commencement of an action in Court.

2.6 The author further submits that she suffers from a serious skin disease, haemorrhoidal vasculitis and that the conditions of the prison in which she was detained aggravated her medical condition. In this context, she states that there was no adequate food or medication in the prison, that the cells, designed for 24 persons, held 60, and that she was detained together with serious criminals. The author submits that, given she did not have any previous criminal record, and had not been charged with a serious or violent offence, she should not have been remanded in custody. With regard to the prison conditions in the Butyrskaya prison, reference is made to the report of the Special Rapporteur on torture of the Commission on Human Rights, dated 16 November 1994.[2] In March 1996, the author was transferred to a hospital ward, where she stayed until 17 May 1996, before being transferred back to her cell.

2.7 As to the exhaustion of domestic remedies, the author contends that the Code of Criminal Procedure did not allow appeals from decisions under article 220. In the absence of the possibility of judicial review, the author complained about the unlawfulness of the judge's decision to a number of bodies, including the Moscow Municipal Prosecutor, the Moscow District Prosecutor, the General Prosecutor of the Russian Federation, the Moscow Municipal Department of Justice, the Moscow Municipal Court, and the Moscow Collegium of Judicial Qualification. These bodies confirmed that the judge's decision was not subject to review. Moreover, the Ministry of Justice acknowledged that the judge's decision was erroneous, but that it was unable to take any action in the absence of proof of criminal misconduct by the judge. The Municipal Prosecutor acknowledged bureaucratic delays in the investigation of the author's case, but nevertheless did not allow her to be released. No further remedies were said to exist.

The complaint

3. The author contends that her pre-trial detention contravened articles 9, 10 and 14 (3) of the Covenant, as she was deprived of her liberty in contravention of Russian law on criminal procedure, she was not informed promptly of the grounds of her arrest or of any of the charges against her, she was not brought promptly before a judge or judicial officer, and was detained awaiting trial despite the fact that she had no criminal record. She also alleges that the crime she was charged with was not a serious offence, and that there was no reason to believe that she would not appear for investigation or trial. Further, she claims that she was denied the right to take proceedings before the court for a decision on the lawfulness of her arrest. She also invokes the rights contained in articles 7 and 10 of the Covenant in respect of the conditions of detention and lack of medical treatment.

The State party's observations on admissibility and merits

4. By note dated 4 April 1997, the State party submitted an "interim reply" to the communication. It contended that criminal proceedings against the author had been instituted on charges of large-scale fraudulent misappropriation of money. It explained that, in view of the serious nature of the charges, she was arrested and taken into custody, and that the investigations had now been completed. The State party advised that criminal proceedings had been instituted against the author on 8 April 1996 in the Tver inter-municipal Court, and that they remained afoot. As the proceedings had not yet concluded, it submitted that the communication was inadmissible on the basis that domestic remedies had not been exhausted.

Comments of the author on the State party's observations

5. In her comments on the State party's observations dated 24 April 1997, the author contended that the State party had not addressed her claims about the unlawfulness of her arrest, and denial of access to a Court to review the lawfulness of her detention, in violation of articles 9 and 14, paragraph 3, of the Covenant. She acknowledged that the trial against her had commenced on 8 April 1996, but stated that it had gone on for over a year without granting due process, and that the court intended to send the case back for further investigation. The author

submitted that the State party's response dealt with the underlying criminal case against her, which was not the subject of her communication to the Committee. She reiterated that domestic remedies had been exhausted in relation to claims of unlawful arrest and denial of access to a Court to challenge the lawfulness of her detention. She further argued that the Courts had continued to refuse her requests to examine the question of whether her arrest was lawful, and that it was not possible to appeal the original decision of the Tver inter-municipal Court.

Decision on admissibility

6. At its sixty-second session, the Committee determined that the communication was admissible, noting that the State party had not addressed the admissibility of the author's claim concerning the circumstances of her detention, and that the author's claims did not relate to her current trial, but to her arrest and detention, which, according to her, were unlawful and with respect to which domestic remedies had been exhausted. The Committee noted that the communication may raise issues under articles 7, 9, 10 and 14 (3) which should be examined on their merits. It invited the State party to submit written explanations or statements clarifying the matters raised in the communication. The decision was transmitted to the State party on 27 April 1998.

Further communication from the author and observations from the State party

7.1 On 17 August 1998, the author submitted a further communication, requesting that the Committee examine additional alleged violations by the State party of her Covenant rights. The communication did not address the matters raised in the original communication, but rather events which had occurred subsequently. The author stated that on 21 March 1997, the Tver inter-municipal Court had ordered that she continue to be held in custody pending a further investigation into the charges against her. She submitted that a decision of the Constitutional Court on 2 July 1998 had found article 331 of the Criminal Code invalid, the implication of which was that she had the right to appeal the former Court's decision to conduct a further investigation into her case; however, despite this, based on a very narrow reading of the Constitutional Court's decision, the Tver inter-municipal Court had refused to refer the author's matter to appeal. It transpires from the file that the author was released from prison on 9 December 1997, although the circumstances are not explained.

7.2 By note dated 29 March 1999, the State party contended that on 5 February 1993, a criminal investigation had been commenced into the author's suspected involvement in large-scale fraud, and that, under Russian law, this was considered a serious offence. It stated that, because the author had evaded the investigating authorities, a warrant had been issued for her arrest, that the investigation was suspended during the search, and reinstated after her eventual arrest. The State party argued that the investigation was extended in accordance with article 133 (3) of the Code of Criminal Procedure, and that the process of extending the period of investigation involved no violations of Russian law. It noted that criminal procedure laws made no provision for a person in police custody to be brought before a judge or other judicial officer. The State party submitted that during the arrest the author had been informed of the reasons for her arrest in 1995 and the charges against her, and the reasons for the decision to place her in preventive detention. This process was reviewed, following a complaint by the author to the Prosecutor's office, and no violations of domestic law were found to have occurred. The State party notes that in December 1997 the author was released from preventive detention and in lieu thereof an order was issued for her to remain at her permanent address. It further noted that proceedings before the Tver inter-municipal Court remained under way, and that a decision was still pending owing to the author's failure to appear before the Court.

7.3 In her comments on the State party's observations, undated, counsel reiterated that the author's detention in 1995 had taken place after the legal expiry of the investigation period, and that the courts had refused to consider her petition about the lawfulness of her arrest. Details are then provided about the continuing passage of her case through the State party's court system, claiming further violations of the Covenant by the State party over the period from December 1997 until May 1999, in relation to the length of the ongoing trial process, and her arrest and detention for a second time by the Russian authorities on 30 March 1999 (it transpired that she was released on 4 October 1999). She also claims that her illness should have qualified her for release from detention on medical grounds.

7.4 On 16 March 2000, the author submitted information to the Committee about her third arrest by the authorities on 10 November 1999, alleging further violations of the Covenant by the State party in relation to the continuing and protracted Court proceedings against her, and the decision of the Court to remand her in custody. It transpires from the file that she was released on 25 April 2000.

7.5 By note dated 23 November 2000, the State party reiterated that the author tried to evade the initial inquiry and the charge was presented to her in absentia on 5 April 1993. While she was being sought, the investigation was suspended in accordance with relevant provisions of the Code of Criminal Procedure. The State party submitted that the author had been interrogated as an accused on 9 March 1995. At that time she was handed a decision on charges against her and appended a handwritten note stating that she was familiar with the text of the decision and that she is contesting the charge. The State party argues that the arrest of the author on 26 August 1995 had been appropriate in view of the seriousness of the fraud charges against her and the fact that she had evaded the initial inquiry into the alleged fraud. The State party claims that on 27 August 1995, the author was advised of her right to appeal to the courts against her detention, and that the author did have access to a court to challenge the lawfulness of her detention - her complaint dated 27 August 1995 reached the Tver inter-municipal Court in Moscow on 1 September 1995, but the judge declined to entertain it. A second petition regarding her detention was heard by the Lyubinsky inter-municipal court on 9 December 1997, and by order of a Federal judge the preventive measure against the author was changed from detention to an order not to leave the area. The State party also contends that, whilst the author was in detention, she was given the necessary medical care. It stated that her illness could constitute a ground for releasing a prisoner, but only where it was in an advanced state. The State party noted that it could not verify whether in August 1995 the author was held in a cell with convicted criminals - the relevant documentation had been destroyed in accordance with the usual deadlines. It also noted that the author had now been detained for a fourth time, on 28 August 2000, following her failure to appear in Court.

7.6 On 22 May 2002, the author submitted a further communication, insisting that the State party had not explained why she was not provided with genuine access to a court on 13 September 1995, namely why the Court had failed to entertain her petition, and affirming that the physical conditions of her detention were inhuman. The author advised that on 9 April 2002 the proceedings against her had finally been closed.

Author's proceedings before the European Court of Human Rights

8.1 Although the matter was not raised in the submissions of the author or the State party, the Committee is aware that, on 9 November 1998, after its decision on the admissibility of her communication on 2 April 1998, the author submitted a complaint to the European Court of Human Rights (European Court), which was registered as case No. 46133/99. The European Court considered the admissibility of the author's complaint on 3 October 2002. In its decision, the European Court examined, for the purposes of its own admissibility requirements, the fact that the author had submitted a communication to the Committee. The European Court noted the author's arguments in defence of the admissibility of her complaint before the Court, stating:

> *"(The complainant) asserts that her application to Geneva in 1995* (sic)[3] *concerned only the events that predated the application, namely the impossibility to obtain a judicial review of her arrest on 26 August 1995 and therefore could not touch upon the facts which happened afterwards and were submitted to the Court in November 1998."*[4] (emphasis added)

8.2 The Court noted that the author's communication to the Human Rights Committee was:

> *"directed against her arrest on 26 August 1995, and, in particular, the question whether this arrest was justified, the impossibility to challenge it in the courts, and the alleged inadequate conditions of detention. The scope of the factual basis for (her) application to the Court, although going back to the arrest of 26 August 1995, is significantly wider. It extends to the whole of the proceedings which terminated in 2002, and includes (her) arrest on three more occasions since 26 August 1995. It follows that (her) application is not substantially the same as the petition pending before the Human Rights Committee ... ".*[5]

8.3 The Committee is also aware that, by its decision dated 24 July 2003, the European Court found violations of articles 5, 6 and 8 of the Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention), and ordered the State party to pay to the author compensation in the amount of 6,500 euros.

Issues and proceedings before the Committee

9.1 The Committee's decision on the admissibility of the author's communication necessarily related only to matters presented to the Committee in the initial complaint. It transpires that, following this decision, the author has submitted information about events which occurred subsequently (after 2 April 1996), and accordingly, before considering these further claims, the Human Rights Committee must, in accordance with rule 87 of its rules of procedure, decide whether or not they are admissible under the Optional Protocol to the Covenant.

9.2 There are several considerations bearing on the admissibility of these additional communications. First, the fact that the author has submitted a complaint to the European Court requires the Committee to consider the issue of article 5, paragraph (2) (a) of the Protocol, namely whether "the same matter" is "being examined under another procedure of international investigation or settlement". Insofar as the matters raised in the author's communications to the Committee relate to circumstances occurring after the date of her initial communication to the Committee, these matters appear to the Committee to be the "same" as the matters which were before the European Court. So much appears from the judgement of the European Court, which described the factual circumstances submitted to it by the author in some detail. According to the Court, these cover the author's arrest and detention by the authorities of the State party on four separate occasions. The author's claim before the European Court invoked article 5 of the European Convention (the right to liberty and security of the person) and article 6 (determination of criminal charges within a reasonable time).[6] However, the author's case before the European Court has now been determined, and therefore the same matter is not currently "being examined" under another international procedure. The Committee notes that, at the time the author submitted her additional communications dated 17 August 1998, 16 March 2000, 22 May 2002, and her undated communication of 1999, the same matter was before the European Court. Nevertheless, the wording of article 5 (2) (a) of the Protocol requires the Committee to consider whether, at the time it considers the question of admissibility, the matter is under another international procedure.[7] The declaration issued by the State party in relation to the Optional Protocol does not, unlike the reservations of some States parties, preclude the Committee from considering communications where the same matter has been the subject of another international procedure.[8] Accordingly, the Committee considers that article 5, paragraph 2 (a), poses no obstacle to admissibility in the present circumstances.

9.3 The fact that the European Court has considered the author's case remains relevant to the question of admissibility in other respects. In accordance with article 1 of the Protocol, the Committee can only consider communications from individuals who claim to be victims of a violation by a State party of rights contained in the Covenant. The Committee has previously recognized that a person's status as a victim for the purposes of the Protocol can change over time, and that post admissibility developments can remedy a violation.[9] In this instance, it transpires that the author is not currently in detention, and it would appear that the principal form of redress which could be provided by the State party to remedy any relevant violations of her rights would be an award of compensation. The European Court has ordered payment of compensation in relation to matters arising after 19 June 1998 (the date of the author's first communication to the Committee). Under article 41 of the European Convention, such compensation is directed at affording "just satisfaction to the injured party". These circumstances lead the Committee to the view that the author can no longer be considered a "victim", for the purposes of article 1 of the Protocol, of violations of the Covenant said to have arisen after 19 June 1998.

9.4 Accordingly, the Committee considers that, to the extent that the author's communications relates to events occurring after 19 June 1998, they are inadmissible under article 1 of the Protocol. It now proceeds to consider the merits of the remainder of the author's communication.

Consideration of the merits

10.1 With regard to the author's claim that she was denied access to a Court to challenge the lawfulness of her detention on 27 August 1995, the Committee notes that the State party, in its observations dated 23 November 2000, refers only to the fact that the author's complaint about the lawfulness of her detention dated 27 August 1995 reached the Tver inter-municipal Court in Moscow on 1 September 1995 (although it was not considered until 13 September), and that the judge declined to entertain it. It transpires from the submissions that the trial judge did not entertain the complaint on the basis that the investigation had been completed, and that therefore the Court was not competent to hear the author's petition. The right of a person deprived of her liberty to take proceedings before a court to challenge the lawfulness of her detention is a substantive right, and entails more than the right to file a petition - it contemplates a right for a proper review by a court of the lawfulness of the detention. Accordingly, the Committee finds a violation by the State party of article 9 (4). Similarly, given that the decision of the judge not to entertain the author's petition on 13 September was made ex parte, the Committee is of the view that the author was not brought promptly before a judge, in violation of article 9 (3). In this regard, the Committee notes with concern the State party's submission of 29 March 1999 that its criminal procedure laws, at least at that time, made no provision for a person in police custody to be brought before a judge or other judicial officer.

10.2 The author's submission that she should not have been detained pending trial invokes article 9 (3), which states that it shall not be the general rule that persons awaiting trial shall be detained in custody. However, in light of its finding of a violation of article 9 (3) above, the Committee considers it unnecessary to consider these allegations.

10.3 With regard to the author's claim that she was not informed promptly of the charges against her, the Committee does not consider there to have been a violation by the State party of article 9 (2) or 14 (3) of the Covenant. Upon her arrest on 26 August 1995, it appears that she was not formally advised of the charges against her until 31 August 1995. However, it appears that she had been previously advised of the charges against her when she was interrogated in September 1994. The State party contends that the author was advised of the reasons for her arrest and why she was being placed in preventive detention. In these circumstances, the Committee considers that it is not in a position to establish any violation of the State party's obligations under articles 9 (2) and 14 (3) (a) of the Covenant.

10.4 In relation to the author's claim that she was not tried without undue delay, the Committee notes that it has to limit its examination to the period between the initiation of criminal proceedings against the author in February 1993 and the date of her communication to the Committee on 19 June 1996 (see paragraph 9.3 above). This period exceeds three years. However, the author has not contested the submission of the State party that she had evaded the authorities for much of this time. In these circumstances, the Committee considers that there has not been a violation of article 14 (3) (c) of the Covenant.

10.5 The author's original communication raised issues under articles 7 and 10, paragraph 1, of the Covenant insofar as she claims that the physical circumstances of her detention amounted to cruel, inhuman or degrading treatment or punishment. The author has provided a detailed account of the circumstances of her detention. In response, the State party submitted that the author was provided with medical assistance during her detention. It did not provide details of the physical conditions in which the author was detained. Accordingly, the Committee cannot do otherwise than afford due weight to the author's claims. The Committee, in accordance with its jurisprudence, considers that the burden of proof cannot rest solely with the author of the communication, considering that the author and the State party do not always have equal access to the evidence. In the circumstances, the Committee is of the view that the conditions of the author's detention as described in her complaint were incompatible with the State party's obligations under article 10, paragraph 1, of the Convention. In light of this finding in respect of article 10, a provision of the Covenant dealing specifically with the situation of persons deprived of their liberty and encompassing for such persons the elements set out generally in article 7, it is not necessary separately to consider the claims arising under article 7 of the Covenant.

11. The Human Rights Committee, acting under article 5, paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights, finds that the State party violated article 9, paragraphs 3 and 4, and article 10 (1) of the Covenant.

12. Pursuant to article 2, paragraph 3 (a), of the Covenant, the Committee considers that the author is entitled to an effective remedy, including appropriate compensation for the violations suffered. The State party is also under an obligation to take effective measures to ensure that similar violations do not recur.

13. By becoming a State party to the Optional Protocol, the State party has recognized the competence of the Committee to determine whether there has been a violation of the Covenant or not, and that, pursuant to article 2 of the Covenant, the State party has undertaken to ensure all individuals within its territory or subject to its jurisdiction the rights recognized in the Covenant, and to provide an effective and enforceable remedy in cases where a violation has been established. The Committee wishes to receive from the State party, within 90 days, information about the measures taken to give effect to the Committee's Views. The State party is also requested to publish the Committee's Views.

[Adopted in English, French and Spanish, the English text being the original version. Subsequently to be issued also in Arabic, Chinese and Russian as part of the present report.]

Notes

[1] The Optional Protocol entered into force in relation to the Russian Federation on 1 January 1992.

[2] E/CN.4/1995/34/Add.1, paras. 70 and 71.

[3] The application was made on 19 June 1996.

[4] Page 10 of the decision.

[5] Page 11 of the decision.

[6] It also invoked article 8 (freedom from interference in private life).

[7] Communication No. 349/1988 (*Wright v. Jamaica*).

[8] The declaration reads, relevantly: "The Soviet Union also proceeds from the understanding that the Committee shall not consider any communications unless it has been ascertained that the same matter is not being examined under another procedure of international investigation or settlement and that the individual in question has exhausted all available domestic remedies."

[9] Communication No. 50/1979 (*Van Duzen v. Canada*).

B. Communication No. 793/1998, *Pryce v. Jamaica* (Views adopted on 15 March 2004, eightieth session)*

Submitted by:	Errol Pryce (represented by counsel, Mr. Hugh Dives, lawyer)
Alleged victim:	The author
State party:	Jamaica
Date of communication:	30 May 1997 (initial submission)

The Human Rights Committee, established under article 28 of the International Covenant on Civil and Political Rights,

Meeting on 15 March 2004,

Having concluded its consideration of communication No. 793/1998, submitted to the Human Rights Committee on behalf of Errol Pryce under the Optional Protocol to the International Covenant on Civil and Political Rights,

Having taken into account all written information made available to it by the author of the communication and the State party,

Adopts the following:

Views under article 5, paragraph 4, of the Optional Protocol

1.1 The author of the communication, dated 30 May 1997, is Errol Pryce, a Jamaican citizen born on 28 September 1971. He claims to be a victim of violations by Jamaica of articles 7 and 10, paragraph 1, of the International Covenant of Civil and Political Rights. He is represented by counsel.

1.2 Both the Covenant and Optional Protocol entered into force for the State party on 23 March 1976. The State party denounced the Optional Protocol on 23 October 1997, with effect from 23 January 1998.

The facts as submitted by the author

2.1 The prosecution alleged that the author lived with his girlfriend in the same premises. On the night of 24 June 1992, the author quarrelled with his girlfriend. He approached her armed with an ice pick. The girl called out to her mother, who came and offered her to come to her house, upon which the author attacked the mother. The injuries inflicted on her by the author left her crippled.

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* The following members of the Committee participated in the examination of the present communication: Mr. Abdelfattah Amor, Mr. Nisuke Ando, Mr. Prafullachandra Natwarlal Bhagwati, Ms. Christine Chanet, Mr. Franco Depasquale, Mr. Maurice Glèlè Ahanhanzo, Mr. Walter Kälin, Mr. Ahmed Tawfik Khalil, Mr. Rafael Rivas Posada, Sir Nigel Rodley, Mr. Martin Scheinin, Mr. Ivan Shearer, Mr. Hipólito Solari Yrigoyen, Ms. Ruth Wedgwood, Mr. Roman Wieruszewski and Mr. Maxwell Yalden.

2.2 On 8 August 1994, the author was tried and convicted by the Home Circuit Court in Kingston of wounding with intent. He was sentenced to four years' hard labour and to six strokes of the tamarind switch. The author applied for special leave to appeal in the Court of Appeal, arguing that the sentence was manifestly excessive in the circumstances of the case. The court, considering the high incidence of violent crime in the society, particularly against women, refused application for leave to appeal. The author states that he has no financial means and is not entitled to any legal aid to pursue a constitutional motion.

2.3 As set out in an affidavit provided by the author, he was released on 1 March 1997, after appropriate remission for good behaviour.

2.4 The tamarind switch punishment was carried out on 28 February 1997, the day before his release. As the author states in his affidavit, he was blindfolded and ordered to drop his pants and underpants. His feet were lifted and placed in slots in the floor in front of a barrel that was lying on its side. His arms were drawn forward so that his body was lying across the barrel. A warder placed the author's penis into a slot cut out in the side of the barrel. His wrists and ankles were strapped to the platform. He states that a doctor and about 25 prison warders were present during the whipping. According to the author, the doctor did not examine him afterwards.

The complaint

3.1 The author claims to be a victim of a violation of articles 7 and 10, paragraph 1, of the International Covenant on Civil and Political Rights. He claims that the tamarind switch punishment amounts to cruel, inhuman and degrading punishment contrary to articles 7 and 10, paragraph 1, of the Covenant. In the absence of regulations more comprehensive than those set out in the Approval and Directions (under section 4 of the Crime (Prevention of) Act), the procedure is said to be largely at the discretion of the implementing prison authorities.

3.2 Alternatively, the author claims that the use of a tamarind switch on the buttocks, as a form of punishment, is inherently cruel, inhuman and degrading. In this respect he cites the decision of the Zimbabwe Supreme Court in *S. v. Ncube and Others*,[1] in which the Court observed that "The raison d'être underlying [the prohibition on inhuman and degrading punishment] is nothing less than the dignity of man ...".

3.3 The author notes that the trial judge emphasized that the punishment and whipping was designed to "prevent crime", an evaluation confirmed by the Court of Appeal. In this respect the author claims that there is no evidence that whipping acts as a deterrent to serious crime either generally or particularly in Jamaica. He cites the judgement of the European Court of Human Rights in *Tyrer v. United Kingdom*,[2] where the Court observed that "the prohibition [against inhuman and degrading punishment or treatment] contained in article 3 of the European Convention on Human Rights is absolute and, under article 15 (2), the Contracting States may not derogate from article 3 even in the event of war or other public emergency threatening the life of the nation. Otherwise in the Court's view, no local requirement relating to maintenance of law and order would entitle any of the States … to make use of a punishment contrary to article 3".

3.4 Further, it is stated that under Regulation 9 of the Flogging Regulation Act 1903, "in no case shall sentence of flogging be passed upon a female ...". In this respect the author contends that if the deterrence of serious crime were the primary purpose of the provision, "such exception would not arise". Rather, the exception serves to emphasize that the punishment is intrinsically inhuman and/or degrading.

3.5 The author argues that if whipping is not an intrinsically cruel, inhuman and degrading treatment or punishment, the particular circumstances of whipping in Jamaica are contrary to articles 7 and 10 (1) of the Covenant. He notes that the Jamaican Regulations make no provision for the date on which the sentence must be carried out. In this respect, he refers to the decision of the Judicial Committee of the Privy Council in London in *Pratt & Morgan v. Attorney-General of Jamaica* in which the Committee held that the delay in carrying out the death sentence against the author amounted to inhuman and degrading punishment or treatment. In the context of whipping the same principle must apply. In the author's case it is submitted that the delay in carrying out of the whipping sentence until the day before his release represented inhuman and degrading punishment or treatment. The author further submits that the failure to communicate to the prisoner the procedure and the timetable to be followed in carrying out the punishment aggravated the effect of the delay.

3.6 It is further submitted that the manner in which the whipping was carried out and the numbers and identity of witnesses to the punishment, far exceeding what was necessary in the interests of security, was humiliating in itself.

3.7 Finally, it is submitted that the sentence is in practice only pronounced for serious crimes of violence in addition to long terms of imprisonment or hard labour; and thus cannot serve as a deterrent to the individual prisoner. It is claimed that evidence suggests that such punishment does not serve the purpose of deterrence.

3.8 The author submits that his complaint as set out above has not been submitted to any other procedure of international investigation or settlement.

The State party's submission on the admissibility and merits of the communication

4.1 In spite of reminders addressed to it on 5 October 2000 and 11 October 2001, the State party has made no submission on the admissibility or merits of the case.

Issues and proceedings before the Committee

Consideration of admissibility

5.1 Before considering any claim contained in a communication, the Human Rights Committee must, in accordance with rule 87 of its rules of procedure, decide whether or not the case is admissible under the Optional Protocol to the Covenant.

5.2 The Committee has ascertained, as required under article 5, paragraph 2 (a), of the Optional Protocol, that the same matter is not being examined under another procedure of international investigation or settlement.

5.3 The Committee notes that the complaint was submitted prior to the denunciation of the Optional Protocol by Jamaica, 23 October 1997, and that no obstacles to admissibility arise in this respect.

5.4 Concerning the author's allegations that the punishment of whipping with the tamarind switch constitutes cruel, inhuman and degrading punishment, the Committee has noted his contention that, for practical purposes, there was no effective remedy available to him, and that, even if he had a remedy available in theory, it would not be available to him in practice, because of lack of funds and the unavailability of legal aid in constitutional motions. The Committee notes that the State party has not contested the admissibility of the communication. It concludes that there are no obstacles to the admissibility of the communication and proceeds to examine the merits, in the light of the information made available to it by the parties, as required by article 5, paragraph 1, of the Optional Protocol.

Consideration of the merits

6.1 The Human Rights Committee has considered the present communication in the light of all the information made available to it by the parties, as provided under article 5, paragraph 1, of the Optional Protocol. It notes with concern that the State party has not provided any information clarifying the matters raised in the communication. It recalls that it is implicit in article 4, paragraph 2, of the Optional Protocol that a State party should examine in good faith all the allegations brought against it, and provide the Committee with all the information at its disposal. Given the failure of the State party to cooperate with the Committee on the issues raised, due weight must be given to the author's allegations, to the extent that they have been substantiated.

6.2 The Committee notes that the author has made specific and detailed allegations concerning his punishment. The State party has not responded to these allegations. The Committee notes that the author was sentenced to six strokes of the tamarind switch and recalls its jurisprudence,[3] that, irrespective of the nature of the crime that is to be punished, however brutal it may be, corporal punishment constitutes cruel, inhuman and degrading treatment or punishment contrary to article 7 of the Covenant. The Committee finds that the imposition of a sentence of whipping with the tamarind switch on the author constituted a violation of the author's rights under article 7, as did the manner in which the sentence was executed.

6.3 While the author has made an allegation under article 10, paragraph 1, in respect of his treatment the Committee need not address this claim in the light of its finding under article 7 in paragraph 6.2 above.

7. The Human Rights Committee, acting under article 5, paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights, is of the view that the facts before it disclose a violation of article 7 of the Covenant.

8. Pursuant to article 2, paragraph 3 (a), of the Covenant, the Committee considers that the author is entitled to an appropriate remedy including compensation. The State party is under an obligation to ensure that similar violations do not occur in the future and to repeal domestic legislative provisions that allow for corporal punishment.

9. By becoming a State party to the Optional Protocol, the State party has recognized the competence of the Committee to determine whether there has been a violation of the Covenant or not. This case was submitted for consideration before Jamaica's denunciation of the Optional Protocol became effective on 23 January 1998; in accordance with article 12 (2) of the Optional Protocol the communication is subject to the continued application of the Optional Protocol. Pursuant to article 2 of the Covenant, the State party has undertaken to ensure to all individuals within its territory or subject to its jurisdiction the rights recognized in the Covenant and to provide an effective and enforceable remedy in case a violation has been established by the Committee. The Committee wishes to receive from the State party, within 90 days, information about the measures taken to give effect to the Committee's Views. The State party is also requested to publish the Committee's Views.

[Adopted in English, French and Spanish, the English text being the original version. Subsequently to be issued also in Arabic, Chinese and Russian as part of the present report.]

Notes

[1] *S. v. Ncube*; *S. v. Tshuma*; *S. v. Ndhlovu*, 1978 (2) ZLR 246 (SC); 1988 (2) SA 702.

[2] *Tyrer v. United Kingdom*, application No. 5856/72.

[3] See *Malcolm Higginson v. Jamaica*, communication No. 792/1998, where the author was subjected to receive 6 strokes of the tamarind switch, and see also *George Osbourne v. Jamaica*, communication No. 759/1997, where the author was sentenced to 15 years' imprisonment with hard labour and was subjected to receive 10 strokes of the tamarind switch.

C. Communication No. 797/1998, *Lobban v. Jamaica* (Views adopted on 16 March 2004, eightieth session)*

Submitted by:	Dennis Lobban (represented by Mr. Saul Lehrfreund, the Law Firm of Simons Muirhead & Burton, London)
Alleged victim:	The author
State party:	Jamaica
Date of communication:	16 January 1998 (initial submission)

The Human Rights Committee, established under article 28 of the International Covenant on Civil and Political Rights,

Meeting on 16 March 2004,

Having concluded its consideration of communication No. 797/1998, submitted to the Human Rights Committee on behalf of Dennis Lobban under the Optional Protocol to the International Covenant on Civil and Political Rights,

Having taken into account all written information made available to it by the author of the communication, and the State party,

Adopts the following:

Views under article 5, paragraph 4, of the Optional Protocol

1.1 The author of the communication, dated 16 January 1998, is Dennis Lobban, a Jamaican citizen born on 16 January 1955, currently detained at the General Penitentiary, Kingston, Jamaica. He claims to be a victim of violations by Jamaica of articles 7 and 9, paragraphs 2 and 3, article 10, paragraph 1, article 14, paragraph 1, and article 2, paragraph 3, of the International Covenant on Civil and Political Rights. He is represented by counsel.

1.2 Both the Covenant and Optional Protocol entered into force for the State party on 23 March 1976. The State party denounced the Optional Protocol on 23 October 1997, with effect from 23 January 1998.

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* The following members of the Committee participated in the examination of the present communication: Mr. Abdelfattah Amor, Mr. Nisuke Ando, Mr. Prafullachandra Natwarlal Bhagwati, Ms. Christine Chanet, Mr. Franco Depasquale, Mr. Maurice Glèlè Ahanhanzo, Mr. Walter Kalin, Mr. Ahmed Tawfik Khalil, Mr. Rafael Rivas Posada, Sir Nigel Rodley, Mr. Martin Scheinin, Mr. Ivan Shearer, Mr. Hipólito Solari Yrigoyen, Ms. Ruth Wedgwood, Mr. Roman Wieruszewski, and Mr. Maxwell Yalden.

The facts as submitted by the author

2.1 On 17 June 1988, the author was convicted of three counts of murder in the Home Circuit Court of Kingston and sentenced to death. His appeal against conviction was rejected by the Court of Appeal on 4 June 1990. On 30 November 1992, he applied for special leave to appeal to the Judicial Committee of the Privy Council. On 10 February 1993, he was granted leave to appeal. On 6 April 1995, his appeal was dismissed. On 21 July 1995, the author's death sentence was commuted to life imprisonment. It is submitted that the author is unable to pursue a constitutional motion, because of his financial situation and the unavailability of legal aid for the purpose.

2.2 The prosecution contended that the author was one of three men who went to the house of the deceased with the intent of robbery. All three were in possession of firearms. Three persons were shot during the robbery. Two witnesses who knew the author testified that they recognized him. A caution statement by one of the author's co-defendants also identified him. The author denied any participation in the robbery and claimed to have been in a different location when the crime was committed.

2.3 It is submitted that the complaint has not been submitted to any other procedure of international investigation or settlement.

The complaint

3.1 The author alleges that his rights under article 9, paragraph 3, have been violated, since he was arrested on 17 September 1987 and not brought before the Gun Court until 28 September 1987, i.e. 11 days later.

3.2 The author claims that the conditions of his confinement on death row at St. Catherine's District Prison from 17 June 1988 to 20 July 1995 violated articles 7 and 10, paragraph 1, of the Covenant. He invokes the reports of several organizations in support of his argument. These reports are said to show that the conditions are incompatible with the requirements of article 10 of the Covenant, that the provision of medical facilities and health care is lacking, and that prisoners are not provided with education or work programmes. Moreover, ill-treatment of inmates by prison guards is said to occur regularly. It is stated that no effective mechanism exists for dealing with complaints from prisoners. The above is said to constitute violations of articles 7 and 10, paragraph 1, of the Covenant, as well as of the United Nations Standard Minimum Rules for the Treatment of Prisoners. The author alleges that he was locked up in his cell for up to 23 hours a day, that no mattress or bedding were provided, that no integral sanitation existed, that ventilation was inadequate and that there was no natural light.

3.3 He claims that he was not provided with the necessary medical, dental or psychiatric services, and that the food did not meet his nutritional needs. He claims that he is sleeping on cardboard and newspapers, and that his present conditions of detention at the General Penitentiary also violate articles 7 and 10, paragraph 1, of the Covenant.

3.4 Finally, the author alleges that the State party has failed to ensure to him an effective domestic remedy and that constitutes a violation of article 2, paragraph 3, of the Covenant. Moreover, he claims that he was denied the right of access to court as no legal aid is being provided. He is thus barred from exercising his constitutional right to seek redress for the violation of his rights. This is said to be in violation of article 14, paragraph 1, of the Covenant.

The State party's submission on the admissibility and merits of the communication

4.1 In its observations dated 25 September 1998, the State party denies that the author was detained for 11 days before being brought before a magistrate. It notes that according to the author's own communication only three days elapsed (17-20 September 1987). For the State party, this does not amount to undue delay and thus does not violate article 9, paragraph 3 (b), of the Covenant.

4.2 The State party denies that there are inadequate medical facilities at St. Catherine's District Prison, and observes that the prison now has a doctor, that basic medication can be obtained in the medical room, and that prisoners are transported to Spanish Town Hospital whenever the need arises for medical attention.

4.3 In addition, the State party contends that the lack of legal aid for constitutional motions does not constitute a breach of article 14, paragraph 1, of the Covenant. The State party argues that there is no requirement in the Covenant to grant legal aid for constitutional motions. It adds that the absence of legal aid has not proven to be an absolute bar to indigent persons bringing constitutional motions. Moreover, the State party supports its argument by stating that this is illustrated by cases *Pratt & Morgan* and *Neville Lewis v. Attorney-General.*

The author's comments on the State party's submissions

5.1 In his comments of 12 April 1999, the author reiterates that the State party violated article 9, paragraph 3 (b), because he was detained for 11 days before being brought before a judge, in the Gun Court (28 September 1987). He notes that there was a typographical error in the paragraph, to which the State party referred.

5.2 The author claims that in 1996, he suffered from ulcers, gastro-enteritis and haemorrhoids, and that he did not receive medical attention for his ailments. On 29 February 1997, his solicitors wrote to the Commissioner of Corrections, seeking medical attention. On 3 April 1998, his solicitors wrote the second letter to the Commissioner informing that the author had been referred to the hospital on 2 October 1997, but was not taken to this appointment. Furthermore, they reiterated the urgency of the author's medical care. On 11 March 1998, the author was taken to hospital but did not see a doctor. He states that he received some medication for his ulcers and gastro-enteritis but not for haemorrhoids. His solicitors thereupon wrote a further letter to the Commissioner. On 29 January 1999, the Commissioner responded that every effort would be made to ensure that the author received medical attention.

5.3 The author claims that, in practice, medical care and effective assistance was not made available and that he continually suffered from the same ailments for over five years. He argues that despite the numerous responses and referrals, he is yet to see a doctor, and that the State party failed to ensure that he is treated for his medical condition. He claims that the neglect of the prison authorities to adequately deal with his medical problems amounts to a violation of articles 7 and 10, paragraph 1, of the Covenant.

5.4 The author invoking the Committee's decision in *Henry v. Trinidad and Tobago*,[1] alleges that the State party is wrong to assert that there is no requirement under the Covenant to grant legal aid for Constitutional Motions. The author states that article 14, paragraph 1, creates an obligation for States to ensure to all persons equal access to courts and tribunals. In Jamaica, there is a dearth of lawyers who are prepared to take Constitutional Motions on a pro bono basis and the cases *Pratt* and *Neville Lewis*, to which the State party referred, are truly exceptional.

Additional observations by the State party

6.1 By additional submission of 13 July 1999, the State party informs that it will investigate the exact length of the author's detention before being brought before a judge.

6.2 The State party invokes the Committee's decision *Deidrick v. Jamaica*,[2] where the complainant was held on death row for over eight years, was confined to his cell for 22 hours a day, spent most of his time in enforced darkness, and where the Committee held that the complainant had not substantiated specific circumstances that could raise an issue under articles 7 and 10, paragraph 1, of the Covenant, and that this part of his complaint was inadmissible.

6.3 The State party reaffirms that St. Catherine's District Prison has adequate medical facilities: the prison now houses a medical centre with two medical practitioners, a dentist, and their assistants. The State party denies the breach of articles 7 and 10, paragraph 1.

6.4 The State party reaffirms that it has no responsibility to provide legal aid for Constitutional Motions, and that this responsibility only arises in criminal proceedings.

6.5 On 11 February 2000, the State party submitted the results of its investigation, claiming that the author's medical records indicate that he was treated for stomach pains and haemorrhoids and that he received regular medical treatment by the medical centre and Kingston Public Hospital personnel from January 1997 onwards. It adds that the author was provided with adequate sleeping facilities, which are the norm within Jamaican correctional institutions. Moreover, it states that, during the investigation, the author admitted that he has a comfortable mattress at his disposal.

6.6 The State party argues that the author receives a diet, which is prescribed by a dietician and limited by the budget of the institution. The author allegedly admitted that the meals system at the institution provides him with nutritious foods, and that he is comfortable with the system.

Issues and proceedings before the Committee

Consideration of admissibility

7.1 Before considering any claim contained in the communication, the Human Rights Committee must, in accordance with rule 87 of its rules of procedure, decide whether or not the case is admissible under the Optional Protocol to the Covenant.

7.2 The Committee has ascertained, as required under article 5, paragraph 2 (a), of the Optional Protocol, that the same matter is not being examined under another procedure of international investigation or settlement.

7.3 With regard to the author's claim under articles 14, paragraph 1, and 2, paragraph 3, the Committee notes that the author did not seek legal assistance to submit a Constitutional Motion. This claim therefore is inadmissible under article 2 of the Optional Protocol, as it has not been sufficiently substantiated for purposes of admissibility.

7.4 For the remaining claims under articles 7, 10, paragraph 1, and 9, paragraph 3, the Committee considers that there are no other obstacles to the admissibility and thus declares the claims under these articles admissible. It proceeds without further delay with the examination of the merits of the communication, in the light of all information made available to it by the parties, as required by article 5, paragraph 1, of the Optional Protocol.

Consideration of the merits

8.1 The author has claimed a violation of articles 7 and 10, paragraph 1, on the ground of the conditions of detention to which he was subjected while detained on death row at St. Catherine's District Prison. In substantiation of his claim, the author has invoked reports of several non-governmental organizations. The Committee notes that the author refers to the inhuman and degrading prison conditions in general, such as the complete lack of mattresses and very poor quality of food and drink, the lack of integral sanitation in the cells and open sewers and piles of refuse, as well as the absence of a doctor. In addition, he has made specific allegations, stating that he is detained 23 hours a day in a cell with no mattress, other bedding or furniture, that his cell has no natural light, that sanitation is inadequate, and that his food is poor. He is not permitted to work or to undertake education. In addition, he claims that there is a general lack of medical assistance, and that from 1996 he suffered from ulcers, gastro-enteritis, and haemorrhoids, for which he received no treatment.

8.2 The Committee notes that with regard to these allegations, the State party has disputed only that there are inadequate medical facilities, that the author received regular medical treatment from 1997 and that now he has a mattress, receives nutritious food, and that the sewage disposal system works satisfactorily. The Committee notes, however, that the author was detained in 1987 and transferred to death row in June 1988, and from there to the General Penitentiary after commutation of his death sentence, and that it does not transpire from the State party's submission that his conditions of detention were compatible with article 10 prior to January 1997. The rest of the author's allegations stand undisputed and, in these circumstances, the Committee finds that article 10, paragraph 1, has been violated. In light of this finding, in respect of article 10, a provision of the Covenant dealing specifically with the situation of persons deprived of their liberty and encompassing for such persons the elements set out generally in article 7, it is not necessary separately to consider the claims under article 7 of the Covenant.

8.3 The author has claimed a violation of article 9, paragraph 3, of the Covenant, on account of a delay of 11 days between the time of his arrest and the time when he was brought before a judge or judicial officers. After its investigation, the State party did not refute that the author was detained for 11 days, though denying that this delay constitutes a violation of the Covenant. In the absence of any plausible justification for a delay of 11 days between arrest and production of the author before a judge or judicial officer, the Committee finds that this delay constituted a violation of article 9, paragraph 3, of the Covenant.

9. The Human Rights Committee, acting under article 5, paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights, is of the view that the facts as found by the Committee reveal violations by Jamaica of article 9, paragraph 3, and article 10, paragraph 1.

10. Pursuant to article 2, paragraph 3 (a), of the Covenant, the Committee considers that the author is entitled to an appropriate remedy, which should include compensation. The State party is under an obligation to ensure that similar violations do not occur in the future.

11. By becoming a State party to the Optional Protocol, the State party has recognized the competence of the Committee to determine whether there has been a violation of the Covenant or not. This case was submitted for consideration before Jamaica's denunciation of the Optional Protocol became effective on 23 January 1998; in accordance with article 12 (2) of the Optional Protocol the communication is subject to the continued application of the Optional Protocol. Pursuant to article 2 of the Covenant, the State party has undertaken to ensure to all individuals within its territory or subject to its jurisdiction the rights recognized in the Covenant and to provide an effective and enforceable remedy in case a violation has been established by the Committee. The Committee wishes to receive from the State party, within 90 days, information about the measures taken to give effect to the Committee's Views. The State party is also requested to publish the Committee's Views.

[Adopted in English, French and Spanish, the English text being the original version. Subsequently to be issued also in Arabic, Chinese and Russian as part of the present report.]

Notes

[1] Communication No. 752/1997, Views adopted on 17 July 1996.

[2] Communication No. 619/1995, Views adopted on 9 April 1998.

D. Communication No. 798/1998, *Howell v. Jamaica* (Views adopted on 21 October 2003, seventy-ninth session)*

Submitted by:	Floyd Howell (represented by Anthony Poulton, counsel)
Alleged victim:	The author
State party:	Jamaica
Date of communication:	20 January 1998 (initial submission)

The Human Rights Committee, established under article 28 of the International Covenant on Civil and Political Rights,

Meeting on 21 October 2003,

Having concluded its consideration of communication No. 798/1998, submitted to the Human Rights Committee on behalf of Mr. Floyd Howell under the Optional Protocol to the International Covenant on Civil and Political Rights,

Having taken into account all written information made available to it by the author of the communication, and the State party,

Adopts the following:

Views under article 5, paragraph 4, of the Optional Protocol

1.1 The author of the communication is Floyd Howell, a Jamaican citizen detained on death row at St. Catherine's District Prison, Spanish Town, Jamaica - at the date of the submission - and subsequently released on 27 February 1998. He claims to be a victim of a violation by Jamaica of articles 6 (1), 7, 10 (1) and 19 (2) of the International Covenant on Civil and Political Rights. He is represented by counsel.

1.2 The Covenant and the Optional Protocol both entered into force for the State party on 23 March 1976. The State party withdrew from the Optional Protocol on 23 October 1997, with effect from 23 January 1998.

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* The following members of the Committee participated in the examination of the present communication: Mr. Abdelfattah Amor, Mr. Nisuke Ando, Mr. Prafullachandra Natwarlal Bhagwati, Ms. Christine Chanet, Mr. Franco Depasquale, Mr. Maurice Glèlè Ahanhanzo, Mr. Walter Kälin, Mr. Ahmed Tawfik Khalil, Mr. Rajsoomer Lallah, Mr. Rafael Rivas Posada, Sir Nigel Rodley, Mr. Martin Scheinin, Mr. Ivan Shearer, Mr. Hipólito Solari Yrigoyen, Mr. Roman Wieruszewski and Mr. Maxwell Yalden.

Two individual opinions signed by Committee members Mr. Prafullachandra Bhagwati and Ms. Christine Chanet, respectively, are appended to the present document.

1.3 In accordance with rule 86 of the Committee's rules of procedure, the Committee - by note verbale of 22 January 1998 - requested the State party not to carry out the death sentence against Mr. Howell while his communication was under consideration by the Committee.

1.4 The author confines his communication to the conditions of his imprisonment and events that occurred during the period of his incarceration.

The facts as submitted by the author

2.1 The author was charged with seven counts of capital murder and was convicted on all seven counts and sentenced to death on 27 October 1993 by the Home Circuit Court in Kingston. The basis for the charge of capital murder was that the murders had been committed in the course of or in the furtherance of an act of terrorism.

2.2 The author appealed his sentence to the Court of Appeal of Jamaica. The judgement of the Court of Appeal was delivered on 20 November 1995, and the author had his conviction quashed in respect of three counts.

2.3 After his conviction, the author was confined to death row at St. Catherine's District Prison, Spanish Town, Jamaica. On 15 October 1996, the author petitioned the Privy Council in London for leave to appeal against his conviction and sentence. The appeal was set for hearing on 26-27 January 1998, but it remains unclear whether the Privy Council heard the appeal or not.

2.4 In a letter dated 21 March 1997, the author complained to his counsel about the prison conditions at St. Catherine's District Prison, and particularly about an incident which occurred on 5 March 1997. On that day, as a reaction to an escape attempt initiated by four other inmates, some prisoners - including the author - were brutally beaten by two groups of 20 and 60 warders who punished whoever was directly or indirectly involved in the escape attempt. The author observes that "some warders started to beat me from every handle[1] while some were throwing away my personal belongings out of my cell" and that afterwards "the warders carried me into an empty bathroom where my ordeal started again".

2.5 As a result of the beatings, the author was brought to hospital where he informed the doctor that he was "feeling pain all over his body". The author was unable to contact counsel until some time later because he had suffered serious injury to one hand and was beaten to the point that "he could hardly walk". At the time of writing of his letter to the counsel - 16 days after the incident - he alleged that "various parts of [his] body is still swollen". Furthermore, his personal belongings as well as documents relating to his legal appeals were burned; in this connection, he reports that when he returned to his cell "it was almost empty and when I reach down stairs I saw a big fire on the compound with our personal belongings burning in the fire". The author adds that "as far as I understand, the warders got order to beat us and burn up our things".

2.6 The author submits that the scale of the warders' action and the apparent coordination of the respective groups of 20 and 60 warders can only be explained as deliberate and premeditated. In this connection, he alleges that the presence at the prison hospital of the Commissioner of Corrections as well as the Superintendent shortly after the incidents, taken together with the failure properly to investigate and prosecute the perpetrators of these actions, demonstrate the level at which the actions of the prison authorities were known and endorsed. He also states that he knew the names of the warders who searched his cell and beat him, but adds that he felt too threatened to denounce them.

2.7 On 10 March 1997, the author's family, who had come to see him, was not allowed to visit him. The author was also denied access to the Superintendent for a discussion on the terms of family visits, which were not allowed to resume until 12 June 1997.

2.8 On 20 March 1997, the Superintendent issued a "standing order", reportedly prohibiting all inmates to keep either papers or writing implements in their cells. It is noted that, however, the author was able to correspond in writing with his counsel on 21 March and 17 April 1997 and on 15 August 1997 with a friend, Ms. Katherine Shewell.

2.9 Two letters dated 6 January and 4 September 1997 from a friend of the author to counsel, describe the conditions of detention, such as the size of the cells, hygienic conditions, the poor diet and the lack of dental care. It is submitted that visitors under 18 were not allowed into the prison, and the author could not see his children (aged 9 and 6) since he had been imprisoned; the death row compound - where inmates can only leave cells for about 20 minutes per day - is small and dirty, with faeces everywhere. The author could touch the walls on either side when standing in the middle of the floor of his cell and had to paper the walls to cover the dirt. The entire compound smells of sewage. Hygienic and medical conditions are poor, and so is the food. Due to the poor diet and the lack of dental care, the author lost numerous teeth.

2.10 By letter of 2 March 1998, the Committee was informed by the author's counsel, without further explanation of the motives, that the author had been released from St. Catherine's District Prison on 27 February 1998.

The complaint

3.1 The author claims to be a victim of a violation of articles 6 (1), 7, 10 (1) and 19 (2) of the Covenant, because of his treatment since conviction and during his imprisonment on death row, at the hands of the prison authorities.

3.2 He claims that he suffered a violation of articles 7 and 10 (1), because of the violent treatment by the prison authorities and the general conditions of detention of the prison. Even if it is conceded that he had partially cut one of the bars of his cell, regardless of this apparently half-hearted participation in the escape attempt, there can be no justification for the events which followed, that represent a breach of both articles 7 and 10 (1) of the Covenant. The author also submits that the prison conditions and the detention regime and regulations to which he was subjected are contrary to articles 7 and 10 (1). He refers in this context to the United Nations "Standard Minimum Rules for the Treatment of Prisoners". He further alleges that the continued uncertainty as to whether or not he would be executed, caused him severe mental distress that may amount to a further violation of articles 7 and 10. In this connection, the author reports that executions in Jamaica were suspended in February 1988, and that in recent months[2] the Government had taken steps to resume executions.

3.3 The author claims to be a victim of article 6 (1) of the Covenant, because of the possible arbitrary resumption of executions after such a long period of time.

3.4 The author further claims to be a victim of a violation of article 19 (2), as the standing order issued by the Superintendent depriving him of writing implements was in violation of his right "to seek, receive and impart information … in writing".

3.5 The author considers that - as far as domestic remedies regarding abuses during his incarceration are concerned - no effective remedies are available. Furthermore, he claims that, even if it were considered that some remedies are in theory available to him, they are unavailable in practice because of his lack of funds and the unavailability of legal aid. In addition, the author refers to an Amnesty International report of December 1993 which refers to the role of the Parliamentary Ombudsman of Jamaica, who is competent to address problems of detainees in prisons, but which notes that the Ombudsman has no power to enforce his recommendations and lacks the necessary funds to discharge himself of his functions properly. Accordingly, he concludes that the complaint fulfils the requirement of article 5 (2) (b) of the Optional Protocol.

3.6 The author submits that his complaint as set out above has not been submitted to any other procedure of international investigation or settlement.

The State party's submission on the admissibility and merits of the communication

4.1 In spite of reminders addressed to the State party on 12 October 2001 and 1 October 2002, the State party has made no submission on the admissibility or the merits of the case.

Issues and proceedings before the Committee

Consideration of admissibility

5.1 Before considering any claim contained in a communication, the Human Rights Committee must, in accordance with rule 87 of its rules of procedure, decide whether or not the communication is admissible under the Optional Protocol to the Covenant.

5.2 The Committee has ascertained that the same matter is not being examined under another procedure of international investigation or settlement for purposes of article 5, paragraph 2 (a), of the Optional Protocol.

5.3 With regard to the author's allegations relating to the abuses he suffered while in prison and to the prison conditions, the Committee has noted his contention that for practical purposes there are no effective remedies available to him and that, even if he had a remedy available in theory, it would not be available to him in practice because of his lack of funds and the unavailability of legal aid. The State party has not challenged the author's argument. Accordingly, the Committee considers the communication to be admissible as much as it appears to raise issues under articles 7, 10 (1) and 19 (2) of the Covenant.

5.4 As to the author's claim that an arbitrary resumption of executions after a long period of delay would amount to a violation of article 6 (1), the Committee notes that this claim has become moot after the author's release on 27 February 1998.

Consideration of the merits

6.1 The Human Rights Committee has considered the present communication in the light of all the information available to it, as provided in article 5, paragraph 1 of the Optional Protocol. In the light of the failure of the State party to provide to the Committee any observations on the matter before it, due weight must be given to the author's allegations, to the extent that they have been substantiated.

6.2 In relation to the claim as to the violation of articles 7 and 10 (1), the Committee observes that the author has given a detailed account of the treatment he was subjected to and that the State party has not challenged his grievances. The Committee considers that the repeated beatings inflicted on the author by warders amount to a violation of article 7 of the Covenant.[3] Furthermore, taking into account the Committee's earlier views in which it has found the conditions on death row in St. Catherine's District Prison to violate article 10 (1),[4] the Committee considers that the author's conditions of detention, taken together with the lack of medical and dental care and the incident of the burning of his personal belongings, violate the author's right to be treated with humanity and respect for the dignity of his person under article 10 (1) of the Covenant.

6.3 As to the claim that severe mental distress amounts to a further violation of article 7 caused by the continued uncertainty of whether or not the author would be executed, the Committee recalls its constant jurisprudence that prolonged delays in the execution of a sentence of death do not per se constitute a violation of article 7 in the absence of other "compelling circumstances".[5] In the present case, the Committee is of the view that the author has not shown the existence of such compelling circumstances. Accordingly, there has been no violation of article 7 in this respect.

6.4 The Committee has noted the claim that the Superintendent's standing order allegedly deprived the author of writing implements and violated his right under article 19 (2). It observes, however, that the author was able to communicate with counsel within one day of the issuance of this order, and thereafter with counsel and a friend. In the circumstances, the Committee is not in the position to conclude that the author's rights under article 19 (2) were violated.

7. The Human Rights Committee, acting under article 5, paragraph 4, of the Optional Protocol, is of the view that the facts before it disclose a violation of articles 7 and 10 (1) of the Covenant.

8. In accordance with article 2, paragraph 3 (a), of the Covenant, the State party is under an obligation to provide the author with an effective remedy, including compensation. The State party is also under an obligation to prevent similar violations in the future.

9. On becoming a party to the Optional Protocol, the State party recognized the competence of the Committee to determine whether there has been a violation of the Covenant or not. This case was submitted for consideration before the State party's denunciation of the Optional Protocol became effective on 23 January 1998; in accordance with article 12, paragraph 2, of the Optional Protocol it continues to be subject to the application of the Optional Protocol. Pursuant to article 2 of the Covenant, the State party has undertaken to ensure to all individuals within its

territory or subject to its jurisdiction the rights recognized in the Covenant and to provide an effective and enforceable remedy in case a violation has been established. The Committee wishes to receive from the State party, within 90 days, information about the measures taken to give effect to the Committee's Views. The State party is also requested to publish the Committee's Views.

[Adopted in English, French and Spanish, the English text being the original version. Subsequently to be issued also in Arabic, Chinese and Russian as part of the present report.]

Notes

[1] The author appears to refer to being made to run the gauntlet of a group of warders armed with sticks.

[2] Secretariat note: at the time of the submission of the complaint (January 1998).

[3] See for example *McTaggart v. Jamaica*, No. 749/1997, para. 8.7, in which the author was beaten and had his personal belongings burnt.

[4] See particularly *McTaggart v. Jamaica*, communication No. 749/1997.

[5] See e.g. *Johnson v. Jamaica*, No. 588/1994, para. 8.5; *Francis v. Jamaica*, No. 606/1994, para. 9.1.

APPENDIX

Individual opinion of Committee member Mr. Prafullachandra Bhagwati

I agree with the views expressed by the majority of my colleagues in all respects except with regard to paragraph 6.3. I find myself unable to agree with the majority that there are no compelling circumstances in the present case which would lead to a finding of violation of article 7 in the context of prolonged delay on the death row. I am of the view that the facts set out in paragraphs 2.4, 2.5 and 2.6 which are not controverted, clearly amount to "compelling circumstances" warranting a conclusion of violation of article 7. But it is not necessary to find a violation of article 7 on this count, since the Committee has already found violation of article 7 in paragraph 6.2.

(*Signed*): Prafullachandra Natwarlal Bhagwati

[Adopted in English, French and Spanish, the English text being the original version. Subsequently to be issued also in Arabic, Chinese and Russian as part of the present report.]

Individual opinion of Committee member Ms. Christine Chanet

While I agree with the Committee's Views on the violations established, I do not subscribe to the reasoning supported by the majority in paragraph 5.4.

From my viewpoint, the author's complaint based on article 6, paragraph 1, relating to the arbitrary resumption of executions in Jamaica after a long break cannot be set aside on the grounds that the author's release makes it moot.

It would have been more appropriate, in my view, to counter the author's reasoning by pointing out that, since he was citing a general situation without sufficient reference to his own particular case, he could not be regarded as a victim within the meaning of article 2 of the Optional Protocol.

(*Signed*): Christine Chanet

[Adopted in English, French and Spanish, the French text being the original version. Subsequently to be issued also in Arabic, Chinese and Russian as part of the present report.]

E. Communication No. 811/1998, *Mulai v. Republic of Guyana*[*]
(Views adopted on 20 July 2004, eighty-first session)

Submitted by: Ms. Rookmin Mulai (represented by counsel, Mr. C. A. Nigel Hughes of Hughes, Fields & Stoby)

Alleged victim: Mr. Lallman Mulai and Mr. Bharatraj Mulai

State party: Republic of Guyana

Date of communication: 4 March 1998 (initial submission)

The Human Rights Committee, established under article 28 of the International Covenant on Civil and Political Rights,

Meeting on 20 July 2004,

Having concluded its consideration of communication No. 811/1998, submitted to the Human Rights Committee on behalf of Mr. Lallman Mulai and Mr. Bharatraj Mulai under the Optional Protocol to the International Covenant on Civil and Political Rights,

Having taken into account all written information made available to it by the author of the communication, and the State party,

Adopts the following:

Views under article 5, paragraph 4, of the Optional Protocol

1. The author of the communication is Ms. Rookmin Mulai. She submits the communication on behalf of her two brothers Bharatraj and Lallman Mulai, both Guyanese citizens, currently awaiting execution in Georgetown Prison in Guyana. She claims that her brothers are victims of human rights violations by Guyana[1]. Although she does not invoke any specific articles of the Covenant, her communication appears to raise issues under articles 6, paragraph 2, and 14 of the Covenant. After the submission of the communication, the author has appointed counsel who, however, has not been in a position to make any substantive submissions in the absence of any response from the State party.

1.2 On 9 April 1998, the Special Rapporteur on new communication issued a request under rule 86 of the Committee's rules of procedure, that the State party does not carry out the death sentence against the authors while their communication is under consideration by the Committee.

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[*] The following members of the Committee participated in the examination of the present communication: Mr. Prafullachandra Natwarlal Bhagwati, Ms. Christine Chanet, Mr. Franco Depasquale, Mr. Maurice Glèlè Ahanhanzo, Mr. Walter Kälin, Mr. Ahmed Tawfik Khalil, Mr. Rajsoomer Lallah, Mr. Rafael Rivas Posada, Sir Nigel Rodley, Mr. Martin Scheinin, Mr. Ivan Shearer, Mr. Hipólito Solari Yrigoyen, Ms. Ruth Wedgwood and Mr. Roman Wieruszewski.

The facts as submitted by the author

2.1 On 15 December 1992, Bharatraj and Lallman Mulai were charged with the murder of one Doodnauth Seeram that occurred between 29 and 31 August 1992. They were found guilty as charged and sentenced to death on 6 July 1994. The Court of Appeal set aside the death sentence and ordered a retrial on 10 January 1995. Upon conclusion of the retrial, Bharatraj and Lallman Mulai were again convicted and sentenced to death on 1 March 1996. On 29 December 1997, their sentence was confirmed on appeal.

2.2 From the notes of evidence of the retrial, it appears that the case for the prosecution was that Bharatraj and Lallman Mulai had an argument with one Mr. Seeram over cows grazing on the latter's land. In the course of the argument, Bharatraj and Lallman Mulai repeatedly chopped Seeram with a cutlass and a weapon similar to a spear. After Mr. Seeram fell to the ground, they beat him with sticks. On 1 September 1992, Mr. Seeram's corpse was found by his son, drowned in a small river in the proximity of Mr. Seeram's property. It disclosed injuries to the head, the right hand cut off above the wrist and a rope tied around the neck to keep the body submerged in water.

2.3 Evidence against Bharatraj and Lallman Mulai was given by one Nazim Baksh, alleged eyewitness to the incidents. The court also heard Mr. Seeram's son, who had found the body, and, among others, the investigating officer of the police and the doctor, who examined the victim's body on 29 October 1992.

2.4 In a statement from the dock, Bharatraj and Lallman Mulai claimed that they were innocent and had not been present at the scene on the day in question. They stated that they had been on good terms with Mr. Seeram, while they had not been "on speaking terms" with Mr. Baksh.

2.5 By letter of 19 May 2003, counsel advised that Bharatraj and Lallman Mulai remain on death row.

The complaint

3.1 The author claims that her brothers are innocent and that the trial against them was unfair. According to her, unknown persons tried to bribe the foreman of the jury. Two persons visited the foreman on 23 February 1996 at his house and offered to pay him an unspecified amount of money if he influenced the jury in favour of Bharatraj and Lallman Mulai. The foreman reported the matter to the prosecutor and the judge, but it was never disclosed to the defence. Unlike what had happened in other cases, the trial was not aborted due to the incident.[2] Furthermore, Mr. Baksh claimed during his testimony to have been approached by members of the Mulai family. The author argues that, as a result, the foreman and the jury were biased against her brothers.

3.2 The author claims that Mr. Baksh could not be considered a credible witness. She states that Mr. Baksh testified at the retrial that he saw Bharatraj and Lallman Mulai at the scene attacking Mr. Seeram, while at the initial trial he had testified that he could not see the scene, because it was too dark. Furthermore, he testified that Bharatraj and Lallman Mulai had chopped Mr. Seeram several times with a cutlass, while the investigating officer stated that the injuries to the body had been caused by a blunt instrument. Finally, Mr. Baksh testified that Bharatraj and

Lallman Mulai had beaten Mr. Seeram for several minutes, but the doctor could not find any broken bones on the corpse, which would have been a typical injury caused by such beatings. Finally, the doctor estimated that Mr. Seeram's actual cause of death was drowning.

3.3 The author also contends that it would have been typical for the victim to try to fend off the beatings with hands and feet, but that Mr. Seeram's corpse did not show any injuries except the missing right hand. She notes that Mr. Bharatraj Mulai, who was identified by Mr. Baksh as having chopped Mr. Seeram with the cutlass, is right-handed. The author argues that Mr. Seeram's left hand should be missing if he used it to avert a hit with the cutlass by Bharatraj Mulai. The author concedes that the defence attorney did not argue these points on trial.

3.4 Finally, it is claimed that Mr. Baksh gave two different statements to the police. In his first statement on 8 September 1992, he stated that he did not observe anything of the incident, while on 10 December 1992, he gave the statement reflected above, paragraph 3.2. The statements of Mr. Baksh and of Mr. Seeram's son were not consistent either with regard to the existence of trees at the scene. Mr. Seeram's son had stated that there had been many trees close to the scene of the incident.

Issues and proceedings before the Committee

4. On 9 April 1998 and 30 December 1998, 14 December 2000, 13 August 2001, and on 11 March 2003 the State party was requested to submit to the Committee information on the merits of the communication. The Committee notes that this information has still not been received. The Committee regrets the State party's failure to provide any information with regard to admissibility or the substance of the author's claims. It recalls that it is implicit in the Optional Protocol that States parties make available to the Committee all information at their disposal. In the absence of a reply from the State party, due weight must be given to the author's allegations, to the extent that these have been properly substantiated.[3]

Consideration of admissibility

5.1 Before considering any claim contained in a communication, the Human Rights Committee must, in accordance with article 87 of its rules of procedure, decide whether or not it is admissible under the Optional Protocol to the Covenant.

5.2 The Committee has ascertained that the same matter is not being examined under another procedure of international investigation or settlement for the purposes of article 5, paragraph 2 (a), of the Optional Protocol.

5.3 With regard to the author's claim that Mr. Baksh lacked credibility and that testimony provided by the doctor and other witnesses had not been conclusive, the Committee recalls its constant jurisprudence that it is in general for the courts of States parties to the ICCPR, and not for the Committee, to evaluate the facts in a particular case. The information before the Committee and the arguments advanced by the author do not show that the courts' evaluation of the facts and their interpretation of the law were manifestly arbitrary or amounted to a denial of justice. Accordingly, this part of the communication is inadmissible under article 2 of the Optional Protocol.

5.4 The Committee declares the remaining allegations related to the incident of jury tampering admissible insofar as they appear to raise issues under article 14, paragraph 1, and proceeds with its examination on the merits, in the light of all the information made available to it by the author, pursuant to article 5, paragraph 1, of the Optional Protocol.

Consideration of the merits

6.1 The Committee notes that the independence and impartiality of a tribunal are important aspects of the right to a fair trial within the meaning of article 14, paragraph 1, of the Covenant. In a trial by jury, the necessity to evaluate facts and evidence independently and impartially also applies to the jury; it is important that all the jurors be placed in a position in which they may assess the facts and the evidence in an objective manner, so as to be able to return a just verdict. On the other hand, the Committee recalls that where attempts at jury tampering come to the knowledge of either of the parties, these alleged improprieties should have been challenged before the court.[4]

6.2 In the present case, the author submits that the foreman of the jury at the retrial informed the police and the Chief Justice, on 26 February 1996, that someone had sought to influence him. The author claims that it was the duty of the judge to conduct an inquiry into this matter to ascertain whether any injustice could have been caused to Bharatraj and Lallman Mulai, thus depriving them of a fair trial. In addition, the author complains that the incident was not disclosed to the defence although both the judge and the prosecution were made aware of it by the foreman of the jury, and that unlike in some other trials the trial against the two brothers was not aborted as a consequence of the incident. The Committee notes that although it is not in the position to establish that the performance and the conclusions reached by the jury and the foreman in fact reflected partiality and bias against Bharatraj and Lallman Mulai, and although it appears from the material before it that the Court of Appeal dealt with the issue of possible bias, it did not address that part of the grounds of appeal that related to the right of Bharatraj and Lallman Mulai to equality before the courts, as enshrined in article 14, paragraph 1, of the Covenant and on the strength of which the defence might have moved for the trial to be aborted. Consequently, the Committee finds that there was a violation of article 14, paragraph 1, of the Covenant.

6.3 In accordance with its consistent practice the Committee takes the view that the imposition of a sentence of death upon conclusion of a trial in which the provisions of the Covenant have not been respected, constitutes a violation of article 6 of the Covenant. In the circumstances of the current case the State party has violated the rights of Bharatraj and Lallman Mulai under article 6 of the Covenant.

7. The Human Rights Committee, acting under article 5, paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights, is of the view that the facts before reveal violations of article 14, paragraph 1, and article 6 of the International Covenant on Civil and Political Rights.

8. In accordance with article 2, paragraph 3 (a), of the Covenant, the State party is under an obligation to provide Bharatraj and Lallman Mulai with an effective remedy, including commutation of their death sentences. The State party is also under an obligation to avoid similar violations in the future.

9. Bearing in mind that, by becoming a party to the Optional Protocol, the State party has recognized the competence of the Committee to determine whether there has been a violation of the Covenant or not and that, pursuant to article 2 of the Covenant, the State party has undertaken to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the Covenant, and to provide an effective and enforceable remedy in case a violation has been established, the Committee wishes to receive from the State party, within 90 days, information about the measures taken to give effect to the Committee's Views. The State party is also requested to publish the Committee's Views.

[Adopted in English, French and Spanish, the English text being the original version. Subsequently to be issued also in Arabic, Chinese and Russian as part of the present report.]

Notes

[1] The Optional Protocol to the Covenant entered into force for the State party on accession on 10 August 1993. On 5 January 1999, the Government of Guyana notified the Secretary-General that it had decided to denounce the said Optional Protocol with effect from 5 April 1999, that is, subsequent to submission of the communication. On that same date, the Government of Guyana re-acceded to the Optional Protocol with the following reservation: "Guyana re-accedes to the Optional Protocol to the International Covenant on Civil and Political Rights with a Reservation to article 6 thereof with the result that the Human Rights Committee shall not be competent to receive and consider communications from any person who is under sentence of death for the offences of murder and treason in respect of any matter relating to his prosecution, detention, trial, conviction, sentence or execution of the death sentence and any matter connected therewith. Accepting the principle that States cannot generally use the Optional Protocol as a vehicle to enter reservations to the International Covenant on Civil and Political Rights itself, the Government of Guyana stresses that its Reservation to the Optional Protocol in no way detracts from its obligations and engagements under the Covenant, including its undertaking to respect and ensure to all individuals within the territory of Guyana and subject to its jurisdiction the rights recognized in the Covenant (insofar as not already reserved against) as set out in article 2 thereof, as well as its undertaking to report to the Human Rights Committee under the monitoring mechanism established by article 40 thereof."

[2] The file includes a copy of the Appeal Court's judgement where the incident is addressed as having been raised upon appeal as a matter of unfair trial. The Court of Appeal dismissed the appeal on the grounds that the integrity of the jury foreman had not been tainted.

[3] See *J.G.A. Diergaardt et al. v. Namibia*, case No. 760/1997, Views adopted on 25 July 2000, para. 10.2.

[4] See *Willard Collins v. Jamaica*, case No. 240/1987, Views adopted on 1 November 1991, para. 8.4.

F. Communication No. 815/1998, *Dugin v. Russian Federation* (Views adopted on 5 July 2004, eighty-first session)*

Submitted by:	**Alexander Alexandrovitch Dugin (represented by counsel, A. Manov)**
Alleged victim:	**The author**
State party:	**Russian Federation**
Date of initial communication:	**1 December 1997 (initial submission)**

The Human Rights Committee, established under article 28 of the International Covenant on Civil and Political Rights,

Meeting on 5 July 2004,

Having concluded its consideration of communication No. 815/1998 submitted to the Committee on behalf of Alexander Alexandrovitch Dugin under the Optional Protocol to the International Covenant on Civil and Political Rights,

Having taken into account all written information made available to it by the author of the communication and the State party,

Adopts the following:

Views under article 5, paragraph 4 of the Optional Protocol

1. The author of the communication is Alexander Alexandrovitch Dugin, a Russian citizen, born in 1968, who at the time of submission of the communication was imprisoned in the Orel region of Russia.[1] He claims to be a victim of a violation by the Russian Federation of articles 14, paragraphs 1, 2, 3 (a), (e) and (g), 5, and article 9, paragraphs 2 and 3 of the Covenant. He is represented by counsel.

The facts as submitted

2.1 On the evening of 21 October 1994, the author and his friend Yuri Egurnov were standing near a bus stop when two adolescents carrying beer bottles passed by. The author and his friend, both of whom were drunk, verbally provoked Aleksei Naumkin and Dimitrii Chikin in order to start a fight. When Naumkin tried to defend himself with a piece of glass and injured the author's hand, the author and his accomplice hit him on the head and, when he fell down, they kicked him in the head and on his body. Naumkin died half an hour later.

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* The following members of the Committee participated in the examination of the present communication: Mr. Abdelfattah Amor, Mr. Prafullachandra Natwarlal Bhagwati, Mr. Franco Depasquale, Mr. Maurice Glèlè Ahanhanzo, Mr. Walter Kälin, Mr. Ahmed Tawfik Khalil, Mr. Rajsoomer Lallah, Mr. Rafael Rivas Posada, Sir Nigel Rodley, Mr. Martin Scheinin, Mr. Ivan Shearer, Mr. Hipólito Solari Yrigoyen, Ms. Ruth Wedgwood and Mr. Roman Wieruszewski.

2.2 On 30 June 1995, Dugin and Egurnov were found guilty by the Orlov *oblastnoi* (regional) court of premeditated murder with aggravating circumstances. The judgement was based on the testimony of the author, his accomplice, several eyewitnesses and the victim, Chikin, several forensic reports and the crime scene report. Dugin and Egurnov were each sentenced to 12 years' imprisonment in a correctional labour colony.

2.3 During the Orlov court hearing, the author did not admit his guilt, while Egurnov did so partially. In his appeal to the Supreme Court of the Russian Federation on 12 September 1995, Dugin requested that the judgement be overturned. He claimed that he hit Naumkin only a few times and only after Naumkin had struck him with a broken bottle. He also contended that he had approached Egurnov and Naumkin only to stop them from fighting. His sentence was disproportionate and his punishment particularly harsh, having been handed down without regard for his age, his positive character witnesses, the fact that he has a young child, and the lack of premeditation.

2.4 On 12 September 1995, the Supreme Court of the Russian Federation dismissed the author's appeal from his conviction, and on 6 August 1996 the same court denied the author's appeal against his sentence.

The complaint

3.1 The author's counsel states that the surviving victim, Chikin, was not present during the proceedings in the Orlov court, even though the court took into account the statement he had made during the investigation. According to counsel, Chikin gave contradictory testimony in his statements, but as Chikin did not appear in court, Dugin could not cross-examine him on these matters, and was thus deprived of his rights under article 14, paragraph 3 (e), of the Covenant.

3.2 Counsel further claims that the presumption of innocence under article 14, paragraph 2, of the Covenant was not respected in the author's case. He bases this statement on the forensic expert's reports and conclusions of 22 and 26 October, 9 November, 20 December 1994 and 7 February 1995, which were, in his opinion, vague and not objective. He states, without further explanation, that he had posed questions to which the court had had no answer. He therefore requested the court to have the forensic expert appear to provide clarification and comments, and to allow him to lead additional evidence. The court denied his request.

3.3 Counsel refers to serious irregularities in relation to the application of the Code of Criminal Procedure, since the preliminary inquiry and investigation were partial and incomplete, criminal law was improperly applied, and the court's conclusions did not correspond to the facts of the case as presented in Court. The court did not take all necessary measures to guarantee respect for the legal requirement that there should be an impartial, full and objective examination of all of the circumstances of the case.

3.4 Counsel also claims that the author was notified of his indictment for murder only seven days after he was placed in detention and that article 14, paragraph 3 (a), and article 9, paragraphs 2 and 3, of the Covenant were thus violated.

3.5 Counsel alleges that, while Dugin was in detention, he was subjected to pressure by the investigator on several occasions, in an attempt to force him to give false statements in exchange for a reduction in the charges against him. He claims that the investigator threatened that, if he did not do so, his indictment, which had originally been for premeditated murder, would be replaced by an indictment for a more serious offence, namely murder with aggravating circumstances. The author did not give in to the threats and, as had been threatened, the investigator changed the indictment. According to the author, that constituted a violation of article 14, paragraph 3 (g).

3.6 With regard to the allegation of a violation of article 14, paragraph 5, the author states, without further providing details, that his case was not properly reviewed.

3.7 The author also claims that the crime scene report should not have been taken into account during the proceedings because it contained neither the date nor the time of the completion of the investigation, and did not contain enough information about the investigation report. The prosecution witnesses said that there had been a metal pipe present during the fight, however the crime scene report did not refer to such a pipe. The investigator did not examine any such item and the file contains no further information on it.

The State party's submission

4.1 In its submission of 28 December 1998, the State party states that the Office of the Procurator General of the Russian Federation had carried out an investigation into the matters raised in the communication. The prosecution's investigation had found that, on 21 October 1994, Dugin and Egurnov, who were both drunk and behaving like "hooligans", beat up Naumkin, a minor, kicking and punching him in the head and on his body. Naumkin tried to escape, but was caught by Dugin, who knocked him to the ground and beat his head against a metal pipe. He and Egurnov then started beating the minor again, also kicking him in the head. Naumkin subsequently died of head and brain injuries.

4.2 According to the State party, the author's guilt was established by the fact that he did not deny having beaten up Naumkin, and by detailed statements given by eyewitnesses with no interest in the outcome of the case, as well as the testimony of Chikin.

4.3 The cause of Naumkin's death and the nature of the injuries were established by the court on the basis of many forensic medical reports, according to which Naumkin's death was caused by skull and brain injuries resulting from blows to the head.

4.4 The State party maintains that the author's punishment was proportionate to the seriousness of the offence, information about his character and all the evidence in the case. The Office of the Procurator General concluded that the present case did not involve any violations likely to lead to any change or overturning of the courts' decisions, and that the proceedings against Dugin had been lawful and well-founded.

Comments by counsel on the State party's submissions

5.1 In his undated comments, counsel contends that the State party did not address the main allegations contained in the communication, particularly with regard to the violation of the right to request that witnesses able to provide information on behalf of the accused should be heard and summoned by the court. Secondly, the court heard the case in the absence of Chikin, who was both a victim and a witness in the case.

5.2 Counsel also refers to the fact that the court did not respect the principle that any doubt should be interpreted in favour of the accused. Nor had it responded to the author's claims that: the author had requested a forensic expert to be summoned to appear in court but that, without even meeting in chambers, the judges dismissed his request; and the author had had no opportunity to look at the records of the proceedings (although he does not specify when, i.e. before the cassation appeal or during the initial proceedings).

5.3 Finally, counsel maintains that the author was not informed of the content of article 51 of the Constitution of the Russian Federation, which states that "no one shall be obliged to give evidence against himself, his spouse or his close relatives".

Admissibility decision

6.1 During its seventy-second session, the Human Rights Committee examined the admissibility of the communication. It observed that the State party had not objected to the admissibility of the communication, and ascertained that the requirements of article 5, paragraph 2 (b), of the Optional Protocol had been satisfied.

6.2 The Committee ascertained that the same matter was not already being examined under another procedure of international investigation or settlement. In this respect it had been established that, after the case had been submitted to the Committee in December 1997, an identical claim was submitted to the European Court of Human Rights in August 1999, however this claim was declared inadmissible *ratione temporis* on 6 April 2001. The Committee therefore concluded that it was not prevented from considering the communication under article 5, paragraph 2 (a), of the Optional Protocol.

6.3 With regard to the author's allegation under article 9, paragraph 2, of the Covenant, the Committee concluded that the author had been aware of the grounds for his arrest. As to the allegation under article 9, paragraph 3, of the Covenant, the Committee noted that the author had failed to substantiate his claim, and, in accordance with article 2 of the Optional Protocol, declared this part of the communication inadmissible.

6.4 However, the Committee considered that the author's allegations of violations of article 14 of the Covenant could raise issues under this provision. Accordingly, on 12 July 2001, the Committee declared the communication admissible insofar as it appeared to raise issues under article 14 of the Covenant.

The State party's observations on admissibility and merits

7.1 By note dated 10 December 2001, the State party submitted its comments on the merits of the communication. It stated that on 11 March 1998, the Presidium of the Supreme Court had reviewed the proceedings against the author in both the Orlov Court (30 June 1995) and the Supreme Court (12 September 1995). It reduced the sentence imposed on the author from 12 to 11 years' imprisonment, excluding from the consideration of aggravating circumstances the fact that the author had been intoxicated at the time of the offence. In all other respects the decisions were confirmed.

7.2 In relation to the author's claim that he had no opportunity to cross-examine Chikin, the State party noted that the witness had been summoned to Court from 23 to 26 June 1995, but had not appeared. A warrant was issued to have him brought before the Court, but the authorities could not locate him. Under articles 286 and 287 of the Code of Criminal Procedure, the evidence of witnesses is admissible even in their absence, in circumstances where their appearance in Court is not possible. The Court decided to admit the written statement of Chikin into evidence, after hearing argument from the parties as to whether this should occur. According to the transcript of proceedings, no questions were asked by counsel after the statement was read into evidence. The State party notes that the author did not object to the trial starting in the absence of Chikin.

7.3 The State party denies that the evidence of the forensic expert was not objective, and states that, after the first forensic opinion was considered incomplete, four additional opinions from the same expert were obtained by the investigator. The conclusions of the expert were consistent with the testimony of other witnesses, namely that the author had punched and kicked the deceased, and hit him with a metal pipe. The Court refused the author's request to cross-examine the expert and to summon additional witnesses to support his opinion that the deceased had been involved in another fight shortly before his death. In this regard, Russian law did not require courts to summon expert witnesses. Further, the opinions of the expert had been examined and verified in the Republican Centre for Forensic Medical Examination.

7.4 As to the author's claims regarding his detention without charge for 7 days, the State party notes that the Code of Criminal Procedure allows a suspect to be detained without being charged for a period of up to 10 days in exceptional circumstances. In the author's case, criminal proceedings were initiated on 22 October 1994, the author was arrested the same day, and he was charged on 29 October 1994, within the 10-day limit imposed by law.

7.5 The State party refutes the author's claims that the investigator threatened to charge him with a more serious offence if he did not cooperate, and states that, in response to a question by the presiding judge during the proceedings, the author had confirmed that the investigators had not threatened him, but that he had given his statements "without thinking".

7.6 The State party rejects the author's claims that the crime scene report did not bear a date or refer to the metal pipe against which the deceased was said to have hit his head; on the contrary, the report states that it was compiled on 22 October 1994, and that there is a reference to the metal pipe, together with a photograph in which the pipe can actually be seen.

7.7 The State party contends that there is no basis to conclude that the proceedings against the author were biased or incomplete, and notes that the author made no such complaints to the Russian Courts or authorities. It states that the author was questioned in the presence of a lawyer of his choosing, and during the period of his arrest he stated that he did not require a lawyer. Finally, the State party notes that the reason why the author was not informed about his rights under article 51 of the Constitution, which provides that an accused is not required to testify against oneself, was because the Supreme Court only introduced such a requirement by judgement of 31 October 1995 - the author's trial was held in June 1995. In any event, the author was informed about his rights under article 46 of the Code of Criminal Procedure, which states that an accused has the right to testify, or not to testify, on the charges against him.

Comments of the author on the State party's observations

8. In his comments on the State party's observations dated 5 February 2002, the author contends that the witness Chikin could have been located and brought to court for cross-examination, with a minimum of "goodwill" from the State party. He states that the court's refusal to grant his request to adduce further medical evidence violated his rights under article 14, paragraph 3 (e), of the Covenant, and that the seven-day delay in his being charged was incompatible with article 14, paragraph 3 (a), which requires that an accused is promptly informed of the charges against him. The author reiterates his claims about the alleged threat made by the investigator, and about the trial not being objective. He also notes article 51 of the Constitution had had direct legal force and effect since 12 December 1993.

Issues and proceedings before the Committee

9.1 The Human Rights Committee has considered the present communication in the light of all the information made available to it by the parties, as required by article 5, paragraph 1, of the Optional Protocol. The Committee is mindful that, although it has already considered the admissibility of the communication, it must take into account any information subsequently received from the parties which may bear on the issue of the admissibility of the author's outstanding claims.

9.2 Firstly, the Committee notes that the author's submission of 5 February 2002, regarding the alleged violations of article 14, paragraph 3 (a), is substantively identical to that advanced by the author under article 9, paragraph 2 (see paragraph 3.4 above), which was declared inadmissible. Further, the allegation, although invoking article 14, paragraph 3 (a), does not relate to this provision factually. In the circumstances, the Committee considers that the author has failed sufficiently to substantiate this particular claim, for the purposes of admissibility. Accordingly, the author's claim under article 14, paragraph 3 (a), of the Covenant is inadmissible under article 2 of the Optional Protocol.

9.3 The author claims that his rights under article 14 were violated because he did not have the opportunity to cross-examine Chikin on his evidence, summon the expert and call additional witnesses. While efforts to locate Chikin proved to be ineffective for reasons not explained by the State party, very considerable weight was given to his statement, although the author was unable to cross-examine this witness. Furthermore, the Orlov Court did not give any reasons as to why it refused the author's request to summon the expert and call additional witnesses. These factors, taken together, lead the Committee to the conclusion that the courts did not respect the requirement of equality between prosecution and defence in producing evidence and that this amounted to a denial of justice. Consequently, the Committee concludes that the author's rights under article 14 have been violated.

9.4 In light of the Committee's Views above, it is not necessary to consider the author's claims regarding the objectivity of the evidence produced in court.

9.5 On the basis of the material before it, the Committee cannot resolve the factual question of whether the investigator in fact threatened the author with a view to extracting statements from him. In any event, according to the State party, the author did not complain about the alleged threats, and in fact told the court that he had not been threatened. In the circumstances, the Committee considers that the author did not exhaust domestic remedies in relation to these allegations, and declares this claim inadmissible under article 5, paragraph 2 (b), of the Optional Protocol.

9.6 As regards the author's claims that he was not advised of his rights under article 51 of the Constitution, the Committee notes the State party's submission that the author was informed of his rights under article 46 of the Code of Criminal Procedure, which guarantees the right of an accused to testify, or not to testify on the charges against him. In the circumstances, and in particular taking into account that the author did not challenge the State party's above argument, the Committee considers that the information before it does not disclose a violation of article 14, paragraph 3 (g).

9.7 As far as the claim under article 14, paragraph 5, is concerned, the Committee notes that it transpires from the documents before it that the author's sentence and conviction have been reviewed by the State party's Supreme Court. The Committee therefore concludes that the facts before it do not reveal a violation of the above article.

10. The Human Rights Committee, acting under article 5 (4) of the Optional Protocol to the International Covenant on Civil and Political Rights, is of the view that the facts before it disclose a violation of article 14 of the Covenant.

11. Pursuant to article 2, paragraph 3 (a) of the Covenant, the Committee considers that the author is entitled to an appropriate remedy, including compensation and his immediate release.

12. By becoming a State party to the Optional Protocol, the State party has recognized the competence of the Committee to determine whether there has been a violation of the Covenant or not, and that, pursuant to article 2 of the Covenant, the State party has undertaken to ensure all individuals within its territory or subject to its jurisdiction the rights recognized in the Covenant, and to provide an effective and enforceable remedy in cases where a violation has been established. The Committee wishes to receive from the State party, within 90 days, information about the measures taken to give effect to the Committee's Views. The State party is also requested to publish the Committee's Views.

[Adopted in English, French and Spanish, the English text being the original version. Subsequently to be issued also in Arabic, Chinese and Russian as part of the present report.]

Note

[1] The Optional Protocol entered into force in relation to the Russian Federation on 1 January 1992.

G. Communication No. 867/1999, *Smartt v. Republic of Guyana* (Views adopted on 6 July 2004, eighty-first session)*

Submitted by:	Mrs. Daphne Smartt (not represented by counsel)
Alleged victim:	The author's son, Mr. Collin Smartt
State party:	Republic of Guyana
Date of communication:	28 March 1999 (initial submission)

The Human Rights Committee, established under article 28 of the International Covenant on Civil and Political Rights,

Meeting on 6 July 2004,

Having concluded its consideration of communication No. 867/1999 submitted to the Committee on behalf of Collin Smartt under the Optional Protocol to the International Covenant on Civil and Political Rights,

Having taken into account all written information made available to it by the author of the communication and the State party,

Adopts the following:

Views under article 5, paragraph 4, of the Optional Protocol

1.1 The author of the communication is Mrs. Daphne Smartt. She submits the communication on behalf of her son, Collin Smartt, a Guyanese citizen born in 1959, awaiting execution in Georgetown State Prison in Guyana. She claims that her son is an alleged victim of human rights violations by Guyana.[1] Although she does not invoke any specific articles of the Covenant, the communication raises issues under articles 6 and 14 of the Covenant. The author is not represented by counsel.

1.2 In accordance with rule 86 of the Committee's rules of procedure, the Committee, on 28 April 1999, requested the State party not to carry out the death sentence against Mr. Collin Smartt, while the communication is under consideration by the Committee.[2]

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* The following members of the Committee participated in the examination of the present communication: Mr. Abdelfattah Amor, Mr. Prafullachandra Natwarlal Bhagwati, Mr. Franco Depasquale, Mr. Maurice Glèlè Ahanhanzo, Mr. Walter Kälin, Mr. Ahmed Tawfik Khalil, Mr. Rajsoomer Lallah, Mr. Rafael Rivas Posada, Sir Nigel Rodley, Mr. Martin Scheinin, Mr. Ivan Shearer, Mr. Hipólito Solari Yrigoyen, Ms. Ruth Wedgwood and Mr. Roman Wieruszewski.

The facts as submitted by the author

2.1 The author's son was charged with murder on 31 October 1993 and convicted and sentenced to death on 16 May 1996. On appeal, the Supreme Court confirmed both conviction and sentence.

2.2 From the notes of evidence submitted by the author, it appears that the case for the prosecution was that on 31 October 1993, the author's son, while incarcerated at Georgetown Prison, stabbed Mr. Raymond Sparman, another prisoner, with an instrument made from a stiff wire and a piece of sharpened metal. Mr. Sparman died from his injures shortly after the incident.

2.3 After he was informed of the murder charges against him, Collin Smart, on 31 October 1993, stated before the police that Mr. Sparman had assaulted and attacked him with a piece of wood. The author's son also stated that he could not remember what happened after the incident, as he had passed out and had only regained consciousness after he was brought to Brickton prison.

2.4 On 31 October 1993, the author's son was charged with murder. Thereafter, several prosecution witnesses were heard during the preliminary inquiry (committal hearings) before the Georgetown Magisterial Court. These started on 16 November 1993 with the testimony of the sister of the deceased, who identified him as Raymond Sparman. The author's son was present during the committal hearings, but he was not represented by counsel.

2.5 The prosecution's main witness, Mr. Edward Fraser, Chief Officer at Georgetown Prison, testified that he was on duty on 31 October 1993. At 8.50 a.m., he saw Mr. Sparman standing in the east of the prison yard, with blood running from under one of his eyes. Sparman ran past him and picked up a piece of wood. Mr. Fraser then noticed Collin Smart running towards him, holding a 10-inch long wire. He ignored Mr. Fraser's order to put down the instrument and went after Mr. Sparman. When Mr. Fraser reached them, he saw the author's son swinging the wire at Mr. Sparman. However, he did not see whether it struck him. He caught the right hand of Mr. Smartt, who was fighting with Sparman. The latter broke loose, fell down, got up and ran towards the gate area, followed by several prisoners. The author's son then also ran after Sparman, and Mr. Fraser followed the crowd. He noticed that some prisoners were bringing the author's son towards him. He locked him up and returned to the front gate area, where he found Sparman lying on the ground. Upon cross-examination by the author's son, Mr. Fraser stated that he did not see the author's son injure Sparman.

2.6 Another prosecution witness, Clifton Britton, also a prison officer, testified that, on 31 October 1993, he saw the author's son and Sparman having an argument in the prison yard. He separated them with the help of other prisoners. Mr. Britton's testimony was similar to that of Mr. Fraser. Under cross-examination by the author's son, Mr. Britton stated that he did not see him injure Sparman.

2.7 The forensic report of 5 November 1993 confirms that Mr. Sparman's corpse displayed a lacerated wound on the right cheek below the right eye and a small wound on the left abdomen, and states as cause of death: "Haemorrhage and shock due to perforation of blood vessels in abdomen and perforation of intestines by stab wound."

2.8 At the end of the hearing, the author's son proclaimed his innocence and, in response to the question whether he wished to say anything in answer to the charge, reserved his defence, without calling witnesses. The Magistrate committed him to stand trial on the charge of murder, to be held in the criminal division of the Supreme Court, to begin in June 1994.

2.9 During the trial itself, the author's son was represented by a lawyer of his choosing. Counsel did not call any defence witnesses, limiting himself to cross-examining the prosecution witnesses. Most of the prosecution witnesses repeated their testimony, but in more detail, during the trial.

2.10 Following the hearing of all prosecution witnesses, counsel argued in the absence of the jury, that the prosecution had failed to establish a prima facie case, that no direct evidence had been adduced which proved that the author's son had inflicted the fatal injury on Mr. Sparman, and that the wound could have been inflicted by someone else. The jury would thus have to speculate. In a statement from the dock, the author's son denied having stabbed Mr. Sparman and submitted that other prisoners had motive and opportunity to kill the latter.

2.11 On 16 May 1996, after detailed instructions by the Chief Justice, the jury unanimously found the author's son guilty of murder and sentenced him to death.

2.12 On 23 May 1996, the author's son appealed his conviction, through counsel, to the Supreme Court of Judicature, on grounds that the trial judge erred in finding that a prima facie case had been made out against him, that his defence was not adequately put to the jury, and that the directions of the trial judge relating to circumstantial evidence were inadequate, as it was not sufficiently impressed upon the members of the jury that, in arriving at their verdict, it was necessary for them to consider the evidence as a whole rather than the individual evidential links, and since no attempt was made to assist the jury by explaining the law as regards the drawing of inferences to the evidence in the case. The appeal was dismissed, and the death sentence against the author's son confirmed on 26 March 1999.

2.13 On 4 August and 24 September 2003, the author provided additional information, stating that her son was still on death row, that his death sentence had not been commuted into a lifelong prison sentence, and that she had not received any notice of a date of execution.

The complaint

3.1 The author claims that the trial against her son was unfair, as the only evidence against him was the testimony of Mr. Fraser, who had stated that her son had directed a stab at the deceased which had missed him.

3.2 The author claims further that no witnesses were allowed to give evidence on behalf of her son, who stood alone against the State party.

3.3 The author asks for the death sentence against her son to be commuted into a lifelong prison term, or for her son to be pardoned or to be set free, as appropriate.

Committee's request for State party's observations

4. By note verbale of 28 April 1999, the Committee requested the State party to submit its observations on the admissibility and merits of the communication. Despite four reminders dated 14 December 2000, 24 July 2001, 11 March 2003 and 10 October 2003, no such information was received.

Issues and proceedings before the Committee

Consideration of admissibility

5.1 Before considering any claim contained in a communication, the Human Rights Committee must, in accordance with rule 87 of its rules of procedure, decide whether or not the communication is admissible under the Optional Protocol to the Covenant.

5.2 The Committee has ascertained that the same matter is not being examined under another procedure of international investigation or settlement for purposes of article 5, paragraph 2 (a), of the Optional Protocol[3] and that the author's son has exhausted all available domestic remedies,[4] in accordance with article 5, paragraph 2 (b) of the Optional Protocol.

5.3 As to the allegation that the conviction of the author's son was based on insufficient evidence, the Committee notes that this claim relates to the evaluation of facts and evidence by the trial judge and the jury. The Committee recalls that it is generally for the appellate courts of States parties to the Covenant and not for the Committee to evaluate the facts and evidence in a particular case, unless it could be ascertained that the evaluation of evidence and the instructions to the jury were clearly arbitrary or otherwise amounted to a denial of justice.[5] The Committee notes that the fact that a criminal conviction may be based on circumstantial evidence, as maintained by the author in the present case, does not of itself warrant a finding that the evaluation of facts and evidence, or the trial as such, was manifestly tainted by arbitrariness or amounted to a denial of justice. Accordingly, this part of the communication is inadmissible under article 2 of the Optional Protocol, as the author has failed to substantiate her claim for purposes of admissibility in this respect.

5.4 As regards the author's allegation that her son was denied the right to obtain the examination of witnesses on his behalf, the Committee notes that the trial documents do not corroborate this claim. Thus, when asked by the Court whether he wished to call any witness for the defence, counsel answered in the negative. The Committee observes that counsel was privately retained by the author's son and that his alleged failure to properly represent the author's son cannot be attributed to the State party. Consequently, the author has failed to substantiate this claim, for purposes of admissibility. This part of the communication is therefore inadmissible under article 2 of the Optional Protocol.

5.5 With respect to the author's claim that the trial against her son was otherwise unfair, the Committee notes that the trial documents submitted by the author reveal that her son was not represented by counsel during the committal hearings. It also notes with concern that, despite three reminders addressed to it, the State party has failed to comment on the communication, including on its admissibility. In the absence of any such comments, the Committee considers that the author has sufficiently substantiated, for purposes of admissibility, that the trial against her son was unfair, and declares the communication admissible, insofar as it may raise issues under articles 6 and 14, paragraph 3 (d), of the Covenant.

Consideration of the merits

6.1 The Human Rights Committee has considered the present communication in the light of all the information made available to it by the parties, as provided for in article 5, paragraph 1, of the Optional Protocol. Moreover, in the light of the failure of the State party to cooperate with the Committee on the matter before it, due weight must be given to the author's allegations, to the extent that they have been substantiated. The Committee recalls in this respect that a State party has an obligation under article 4, paragraph 2, of the Optional Protocol to cooperate with the Committee and to submit written explanations or statements clarifying the matter and the remedy, if any, that may have been granted.

6.2 The issue before the Committee is whether the absence of legal representation of the author's son during the committal hearings amounts to a violation of article 14, paragraph 3 (d), of the Covenant.

6.3 The Committee recalls its jurisprudence that legal representation must be available at all stages of criminal proceedings, particularly in cases involving capital punishment.[6] The pre-trial hearings, having taken place before the Georgetown Magisterial Court between 16 November 1993 and 6 May 1994, that is after the author's son had been charged with murder on 31 October 1993, formed part of the criminal proceedings. Furthermore, the fact that most witnesses of the prosecution were examined at this stage of the proceedings for the first time, and were subject to cross-examination by the author's son, shows that the interests of justice would have required securing legal representation to the author's son through legal aid or otherwise. In the absence of any submission by the State party on the substance of the matter under consideration, the Committee finds that the facts before it disclose a violation of article 14, paragraph 3 (d), of the Covenant.

6.4 The Committee recalls that the imposition of a sentence of death upon conclusion of a trial in which the provisions of the Covenant have not been respected constitutes a violation of article 6 of the Covenant.[7] In the present case, the sentence of death was passed without meeting the requirements of a fair trial set out in article 14 of the Covenant, and thus also in breach of article 6.

7. The Human Rights Committee, acting under article 5, paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights, is of the view that the facts before it reveal a violation of articles 6 and 14, paragraph 3 (d), of the Covenant.

8. In accordance with article 2, paragraph 3, of the Covenant, the author's son is entitled to an effective remedy, including the commutation of his death sentence. The State party is also under an obligation to take measures to prevent similar violations in the future.

9. Bearing in mind that, by becoming a party to the Optional Protocol, the State party has recognized the competence of the Committee to determine whether there has been a violation of the Covenant or not and that, pursuant to article 2 of the Covenant, that the State party has undertaken to ensure all individuals within its territory or subject to its jurisdiction the rights recognized in the Covenant and to provide an effective and enforceable remedy in case a violation has been established, the Committee wishes to receive from the State party, within 90 days, information about the measures taken to give effect to the Committee's Views. The State party is also requested to publish the Committee's Views.

[Adopted in English, French and Spanish, the English text being the original version. Subsequently to be issued also in Arabic, Chinese and Russian as part of the present report.]

Notes

[1] The Covenant and the Optional Protocol entered into force for the State party respectively on 15 May 1977 and 10 August 1993. Upon ratification of the Covenant, the State party entered the following reservation in respect of subparagraph (d) of paragraph 3 of article 14: "While the Government of the Republic of Guyana accept the principle of Legal Aid in all appropriate criminal proceedings, is working towards that end and at present apply it in certain defined cases, the problems of implementation of a comprehensive Legal Aid Scheme are such that full application cannot be guaranteed at this time." On 5 January 1999, the State party notified the Secretary-General that it had decided to denounce the Optional Protocol with effect from 5 April 1999, that is subsequent to the initial submission of the communication. On that same date, the State party re-acceded the Optional Protocol with the following reservation: "[...] Guyana re-accedes to the Optional Protocol to the International Covenant on Civil and Political Rights with a Reservation to article 6 thereof with the result that the Human Rights Committee shall not be competent to receive and consider communications from any persons who is under sentence of death for the offences of murder and treason in respect of any matter relating to his prosecution, detention, trial, conviction, sentence or execution of the death sentence and any matter connected therewith. Accepting the principle that States cannot generally use the Optional Protocol as a vehicle to enter reservations to the International Covenant on Civil and Political Rights itself, the Government of Guyana stresses that its Reservation to the Optional Protocol in no way detracts from its obligations and engagements under the Covenant, including its undertaking to respect and ensure to all individuals within the territory of Guyana and subject to its jurisdiction the rights recognised in the Covenant (insofar as not already reserved against) as set out in article 2 thereof, as well as its undertaking to report to the Human Rights Committee under the monitoring mechanism established by article 40 thereof."

[2] The State party has not informed the Committee as to its compliance with the request.

[3] The Republic of Guyana is not a member state of the OAS.

[4] Guyana does not recognize the jurisdiction of the Judicial Committee of the Privy Council as the final instance of appeal.

[5] See e.g. communication No. 329/1988, *D. S. v. Jamaica*, Decision on admissibility adopted on 26 March 1990, at para. 5.2.

[6] See e.g. communication No. 1096/2002, *Kurbanova v. Tajikistan*, Views adopted on 6 November 2003, at para. 6.5; communication No. 781/1997, *Aliev v. Ukraine*, Views adopted on 7 August 2003, at para. 7.3; communication No. 775/1997, *Brown v. Jamaica*, Views adopted on 23 March 1999, at para. 6.6.

[7] See ibid., at paras. 7.7, 7.4 and 6.15, respectively.

H. Communication No. 868/1999, *Wilson v. The Philippines* (Views adopted on 30 October 2003, seventy-ninth session)*

Submitted by:	Albert Wilson (represented by counsel, Ms. Gabriela Echeverria)
Alleged victim:	The author
State party:	The Philippines
Date of communication:	15 June 1999 (initial submission)

The Human Rights Committee, established under article 28 of the International Covenant on Civil and Political Rights,

Meeting on 30 October 2003,

Having concluded its consideration of communication No. 868/1999, submitted to the Human Rights Committee on behalf of Mr. Albert Wilson under the Optional Protocol to the International Covenant on Civil and Political Rights,

Having taken into account all written information made available to it by the author of the communication, and the State party,

Adopts the following:

Views under article 5, paragraph 4, of the Optional Protocol

1. The author of the communication, initially dated 15 June 1999, is Albert Wilson, a British national resident in the Philippines from 1990 until 2000 and thereafter in the United Kingdom. He claims to be a victim of violations by the Philippines of articles 2, paragraphs 2 and 3, 6, 7, 9, 10, paragraphs 1 and 2, 14, paragraphs 1, 2, 3 and 6. He is represented by counsel.

The facts as presented by the author

2.1 On 16 September 1996, the author was forcibly arrested without warrant as a result of a complaint of rape filed by the biological father of the author's 12-year-old stepdaughter and transferred to a police station. He was not advised of his rights, and, not speaking the local language, was unaware as to the reasons for what was occurring. At the police station, he was held in a 4 x 4 ft cage with three others, and charged on the second day with attempted rape of his stepdaughter. He was then transferred to Valenzuela municipal jail, where the charge was changed to rape. There he was beaten and ill-treated in a "concrete coffin". This 16 x 16 ft cell held 40 prisoners with a 6 inch air gap some 10 ft from the floor. One inmate was shot by a drunken guard, and the author had a gun placed to his head on several occasions by guards. The bottoms of his feet were struck by a guard's baton, and other inmates struck him on the guards' orders. He was ordered to strike other prisoners and was beaten when he refused to do so. He was also constantly subjected to extortion by other inmates with the acquiescence and in some instances on the direct instruction of the prison authorities, and beaten when he refused to pay or perform the directed act(s). There was no running water, insufficient sanitary conditions (a single non-flush bowl in the cell for all detainees), no visiting facility, and severe food rationing. Nor was he segregated from convicted prisoners.

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* The following members of the Committee participated in the examination of the present communication: Mr. Abdelfattah Amor, Mr. Nisuke Ando, Mr. Prafullachandra Natwarlal Bhagwati, Mr. Alfredo Castillero Hoyos, Ms. Christine Chanet, Mr. Franco Depasquale, Mr. Maurice Glèlè Ahanhanzo, Mr. Walter Kälin, Mr. Ahmed Tawfik Khalil, Mr. Rajsoomer Lallah, Mr. Rafael Rivas Posada, Sir Nigel Rodley, Mr. Martin Scheinin, Mr. Ivan Shearer, Mr. Hipólito Solari Yrigoyen, Ms. Ruth Wedgwood, Mr. Roman Wieruszewski and Mr. Maxwell Yalden.

2.2 Between 6 November 1996 and 15 July 1998, the author was tried for rape. From the outset, he maintained that the allegation was fabricated and pleaded not guilty. The stepdaughter's mother and brother testified in support of the author, stating that both had been at home when the alleged incident took place, and that it could not have occurred without their knowledge. The police medical examiner, who examined the girl within 24 hours of the alleged incident, made internal and external findings which, according to the author, were wholly inconsistent with alleged forcible rape. Medical evidence procured during the trial also contradicted the allegation, and, according to the author, in fact demonstrated that the act could not have taken place as alleged. There was also evidence of several other witnesses that the story of rape had been fabricated by the stepdaughter's natural father, in order to extort money from the author.

2.3 On 30 September 1998 the author was convicted of rape and sentenced to death, as well as to P50,000 indemnity, by the Regional Trial Court of Valenzuela. According to the author, the conviction was based solely on the testimony of the girl, who admitted she was lying when she first made the allegation of attempted rape, and there were numerous inconsistencies in her trial testimony.

2.4 The author was then placed on death row in Muntinlupa prison, where 1,000 death row prisoners were kept in three dormitories. Foreign inmates were continually extorted by other inmates with the acquiescence, and sometimes at the direction of, prison authorities. The author refers to media reports that the prison was controlled by gangs and corrupt officials, at whose mercy the author remained throughout his confinement on death row. Several high-ranking prison officials were sentenced for extortion of prisoners, and large amounts of weapons were found in cells. The author was pressured and tortured to provide gangs and officials with money. There were no guards in the dormitory or cells, which contained over 200 inmates and remained unlocked at all times. His money and personal effects had been removed from him en route to the prison, and for three weeks he had no visitors, and therefore no basic necessities such as soap or bedding. Food comprised unwashed rice and other inappropriate substances. Sanitation consisted of two non-flushing toilet bowls in an area which was also a 200-person communal shower.

2.5 The author was forced to pay for the 8 x 8 ft area in which he slept and financially to support the eight others with him. He was forced to sleep alongside drug-deranged individuals and persons who deliberately and constantly deprived him of sleep. He was forcibly tattooed with a permanent gang mark. Inmates were stretched out on a bench on public display and beaten with wood across the thighs, or otherwise "taught a lesson". The author states he lived in constant fear coming close to death and suicidal depression, watching six inmates walk to their execution while five others died violent deaths. Fearing death after a "brutally unfair and biased" trial, he suffered severe physical and psychological distress and felt "total helplessness and hopelessness". As a result, he is "destroyed both financially and in many ways emotionally".

2.6 On 21 December 1999, i.e. subsequent to the submission of the communication under the Optional Protocol, the Supreme Court, considering the case on automatic review, set aside the conviction, finding it based on allegations "not worthy of credence", and ordered the author's immediate release. The Solicitor-General had filed a brief with the Court recommending acquittal on the basis that material contradictions in witness testimony, as well as the physical evidence to the contrary, justified the conclusion that the author's guilt had not been shown beyond reasonable doubt.

2.7 On 22 December 1999, on his release from death row, the Bureau of Immigration lifted a Hold Departure Order, on condition that the author paid fees and fines amounting to P22,740 for overstaying his tourist visa. The order covered the entirety of his detention, and if he had not paid, he would not have been allowed to leave the country for the United Kingdom. The ruling was confirmed after an appeal by the British Ambassador to the Philippines, and subsequent efforts directed from the United Kingdom to the Bureau of Immigration and the Supreme Court in order to recover these fees proved similarly unavailing.

2.8 Upon his return to the United Kingdom, the author sought compensation pursuant to Philippine Republic Act 7309. The Act creates a Board of Claims under the Department of Justice for victims of unjust imprisonment or detention, compensation being calculable by month. Upon inquiry, he was informed on 21 February 2001 that on 1 January 2001, he had been awarded P14,000, but that he would be required to claim it in person in the Philippines. On 12 March 2001, he wrote to the Board of Claims seeking reconsideration of quantum, on the basis that according to the legal scale 40 months in prison should result in a sum of P40,000. On 23 April 2001, he was informed that the amount claimed was "subject to availability of funds" and that the person liable for the author's misfortune was the complainant accusing him of rape. No further clarification on the discrepancy of the award was received.

2.9 On 9 August 2001, after applying for a tourist visa to visit his family, the author was informed that as a result of having overstayed his tourist visa and having been convicted of a crime involving moral turpitude, he had been placed on a Bureau of Immigration watchlist. When he inquired why the conviction should have such effect after it had been quashed, he was informed that to secure travel certification he would have to attend the Bureau of Immigration in the Philippines itself.

2.10 The author also sought to lodge a civil suit for reparation, on the basis that the administrative remedy for compensation outline above would not take into account the extent of physical and psychological suffering involved. He was not eligible for legal aid in the Philippines, and from outside the country was unable to secure pro bono legal assistance.

The complaint

3.1 The author alleges a violation of articles 6 and 7 by virtue of the mandatory imposition of the death penalty under s.11 of *Republic* Act No. 7659 for the rape of a minor to whom the offender stands in parental relationship.[1] Such a crime is not necessarily a "most serious crime" as it does not involve loss of life, and the circumstances of the offence may vary greatly. For the same reasons, the mandatory death penalty is disproportionate to the gravity of the alleged crime and contrary to article 7. It is further disproportionate and inhuman, as no allowance is made for the circumstances of the individual crime and the individual offender in mitigation.

3.2 The author contends that the time spent on death row constituted a violation of article 7, particularly in the light of the massive procedural deficiencies of the trial. It is argued that there is, in this instance, a violation of article 7 because of the patently unfair proceedings at trial and the manifestly unsound verdict which resulted in the helplessness and anxiety placed on the author given he was wrongly convicted. This was aggravated by the specific treatment and conditions he was subjected to on death row.

3.3 In terms of article 9, the author argues his initial arrest took place without warrant and in violation of domestic law governing arrests. Nor was he informed at the time of his arrest of the reasons therefore in a language he could understand, or promptly brought before a judge.

3.4 As to the claim of a violation of articles 14, paragraphs 1, 2 and 3, the author contends, firstly, that his trial was unfair. He contends that in emotive cases such as rape of children, a single judge is not necessarily immune to pressures on his or her independence and impartiality, and should not be allowed to impose the death penalty; rather, a judge and jury or bench constituted of several judges should determine capital cases. It is alleged that the trial judge was subjected to "enormous pressure" from local individuals who packed the courtroom and desired the author's conviction. According to the author, some of these persons were brought in from other areas.

3.5 Secondly, the author contends that the trial court's analysis was manifestly unsound and violated his right to presumption of innocence, when it observed that the author's defence of denial that the alleged act took place "cannot prevail over the positive assertions of the minor-victim". In the light of the irreversible nature of the death penalty, the author argues capital trials must scrupulously observe all international standards. Referring to the United Nations Safeguards on the Rights of Those Facing the Death Penalty, the author observes that a capital conviction must be "based upon clear and convincing evidence leaving no room for an alternative explanation of the facts".

3.6 Under article 14, paragraph 6, the author observes that particularly in the light of the compensation procedure provided under domestic law, that the State party was under an obligation to provide fair and adequate compensation for the miscarriage of justice. In this case, the actual award was some one-quarter of his entitlement under that scheme, and this was almost wholly negated by the requirement to pay immigration fines and fees. In a related claim of violation of article 2, paragraph 3, the author contends that instead of being properly compensated for the violations at issue, he was forced himself to pay for the time unjustly held in prison, and remains on the list of excludable aliens, despite having been fully cleared of all charges against him. This violates his right to an effective remedy, amounts to double jeopardy in the form of an additional punishment and contravenes his family rights.

3.7 As to admissibility issues, the author states that he has not submitted his claim to another international procedure, and, concerning the conditions of detention in prison, that he unsuccessfully attempted to raise concerns regarding his treatment and the conditions of detention. This remedy was ineffective as he only had access to the individuals themselves responsible for the incidents in question.

The State party's submissions on admissibility and merits

4.1 By submission of 5 August 2002, the State party contests the admissibility and merits of the case, arguing that numerous judicial, quasi-judicial or administrative remedies would be available to the author. Article 32 of the Civil Code makes any public officer or private individual liable for damages for infringement of the rights and liberties of another individual, including rights to be free from arbitrary detention, from cruel punishment, and so on. The author may also file a claim of damages for malicious prosecution, and/or a case alleging violations of the revised penal code on crimes against liberty and security or crimes against honour. He may also lodge a complaint to the Philippine Commission on Human Rights, but has not done so. The Supreme Court's decision to vacate the lower court's judgement, which was the result of automatic review on death penalty cases, shows that due process guarantees and adequate remedies are available in the judicial system.

4.2 As to the article 7 claims, the State party contends that it cannot adequately respond to the allegations made, as they require further investigation. In any event, the author should have submitted his claim to a proper forum such as the Philippine Commission on Human Rights.

4.3 On the article 14 claims, the State party states that the case was tried before a competent court, that the author was able to present and cross-examine evidence and witnesses, and that he enjoyed a (successful) right of appeal. Nor is there anything to suggest the trial judge promulgated his decision based on anything other than a good faith appreciation of the evidence.

4.4 As to the inadequate sum of compensation paid, the State party points out that on 24 August 2001, the Board of Claims granted the author an additional amount of P26,000 bringing the compensation to the total P40,000 claimed. Although advised that the check was ready for pick-up, the author has not yet done so and it is therefore no longer valid, although it can readily be replaced. As to the contention that the author was denied civil remedies, the State party points out that he was advised by the Board of Claims to consult a practicing lawyer, but that he has failed to pursue redress through the courts.

The author's comments on the State party's submissions

5.1 By letter of 6 April 2002, the author responds to further aspects of the State party's submissions. On the fair trial issues, he points out that even the Solicitor-General regarded the charge against him as deeply flawed, and that thus, especially in capital cases, the trial judge's good faith "honest belief" is not sufficient to legitimize a wrongful conviction. The Supreme Court's decision makes clear that the proceedings failed to comply with what the author regards as the minimum standards set out in article 14. The author contends that the trial judge's approach was biased against him on account of his gender, substituted his own evaluation of the medical evidence for that of the expert involved, and failed to respect the presumption of innocence.

5.2 Moreover, the author's application to exclude the media from trial was denied and full access to the press was granted even before arraignment. Police parading of suspects before the media in the Philippines is well-documented, and in this case the presence of media from the moment the author was first brought before a prosecutor undermined the fairness of the trial. During trial, the court was packed with people from "children, feminist and anti-crime organizations" that were pressing for conviction. Public and media access enhances the fear of partial proceedings in highly emotive cases.

5.3 The author also argues, with reference to the Committee's decision in *Mbenge v. Zaire,*[2] that the violation of his article 14 rights led to an imposition of the death sentence contrary to the provisions of the Covenant, and thus in violation of article 6. The author also argues, with reference to the decision in *Johnson v. Jamaica,*[3] that as the imposition of the death sentence was in violation of the Covenant, his resulting detention, particularly in the light of the treatment and conditions suffered, was cruel and inhuman punishment, contrary to article 7.

5.4 The author argues generally, with reference to the Committee's general comment on article 6, that the re-imposition of the death penalty in a State party is contrary to the object and purpose of the Covenant and violates article 6, paragraphs 1 to 3. In any event, the manner in which the Philippines has reintroduced the death penalty violates article 6, paragraph 2, as well as the obligation contained in article 2, paragraph 2, to give effect to Covenant rights. The Republic Act 7659, providing for the death sentence for 46 offences (of which 23 mandatorily), is flawed and affords no protection of Covenant rights.

5.5 At the time of the author's trial, the applicable criminal procedure required a rape charge to be brought by the victim or her parents or guardian, who have not expressly pardoned the offender. The author argues that to provide for a mandatory death penalty for an offence which cannot even be prosecuted ex officio by the State is a standing invitation for extortion - fabricating an allegation and seeking money for an express pardon. The author repeatedly asserted at trial that the claimant had sought US$ 25,000 in exchange for an "affidavit of desistance". The author's suffering is a direct result of the State's failure to guarantee the most strict legal procedures and safeguards in capital cases generally, and, in particular, in his case.

5.6 As to the descriptions of conditions of detention suffered before conviction in Valenzuela jail, the author refers to the Committee's jurisprudence which has consistently found similar treatment inhumane and in violation of articles 7 and 10.[4] The conditions in Valenzuela are well-documented in reports of Amnesty International and media sources, and plainly fall beneath what the Covenant requires of all States parties, regardless of their budgetary situation. He also advances a specific violation of article 10, paragraph 2, in that he was not separated from convicted prisoners.

5.7 The author argues that there is no obligation to report or complain about conditions of detention when to do so would foreseeably result in victimization.[5] The author provides copies of three letters he did write to the Philippine Commission on Human Rights in 1997, which resulted in him being beaten up and locked in his cell for several days. In 1999, while on death row, the Department of Justice was alerted of threats to the author's life and asked to take steps to protect him. The response was a serious threat to his life, with a gun being placed against his head by a guard (when he had already seen another inmate shot). The author submits that the

State party's inability to respond to these claims in their submissions only underlines the lack of an effective domestic "machinery of control" and the need for investigation and compensation for the violations of article 7 he suffered.

5.8 As to the conditions of detention on death row, it is submitted that they caused serious additional detriment to the author's mental health and constituted a separate violation of article 7. The author suffered extreme anxiety and severe suffering as a result of the detention, with a General Psychiatric Assessment finding the author "very depressed and suffering from severe longstanding [Post Traumatic Stress Disorder] that can lead to severe and sudden self-destructive behaviour". The author refers to the Committee's jurisprudence that while in principle mental strain following conviction does not violate article 7, "the situation could be different in cases involving capital punishment"[6] and that "each case must be considered on its own merits, bearing in mind the imputability … on the State party, the specific conditions of imprisonment in the particular penitentiary and their psychological impact on the person concerned".[7]

5.9 In this case, the author's conviction and the conditions of detention fell well below minimum standards and were plainly imputable to the State party. In addition, death row inmates on appeal were not separated from those whose convictions had become final. During the author's detention, six prisoners were executed (three convicted of rape). In one case, a communications failure prevented a presidential reprieve from stopping an execution. In another, three prisoners were executed despite the Human Rights Committee's request for interim measures of protection.[8] Such events, which took place while the author was on death row, heightened the mental anxiety and helplessness suffered, with detrimental effect on his mental health and thus violated article 7.

5.10 Concerning the State party's contention that adequate remedies are in place, the author submits that the system lacks effective remedies for accused persons in detention, and that the Supreme Court decision represents only partial reparation, providing no redress for the violations of his rights to be free, for example, from torture or unlawful detention. The Supreme Court decision itself cannot be considered as a form of compensation since it only ended an imminent violation of his right to life, for which no compensation would have been possible. The Court did not order compensation, restitution of legal fees, reparation nor an investigation. The author's mental injury and suffering, as well as damage to reputation and way of life, including stigmatism as a child rapist/paedophile in the United Kingdom, remain without remedy.

5.11 Far from receiving appropriate reparation for the violation suffered, the author was in fact doubly punished by having to pay immigration fees and by being excluded from entering the Philippines, both issues subsequently unresolved despite representations to the Philippine authorities. The exclusion also prevents the author from effectively using any remedies available in the Philippines, even if they were appropriate, which he denies. In particular, the civil remedies the State party invokes are neither "available" nor "effective" if he cannot enter the country, and therefore need not be exhausted.

5.12 In any event, according to the author, the State party's domestic law denies remedies in his author's case. The Constitution requires the State's consent to be sued,[9] which has neither expressly nor implicitly been given in this case. Under statutory law, the State is only responsible for the wrongful conduct of "special agents" (a person specially commissioned to perform a particular task). Public officials acting within the scope of their duties are personally liable for damage caused (but may invoke immunity if the suit affects the property, rights or interests of the State). Thus, the State is not liable for illegal acts that are ultra vires and committed in violation of an individual's rights and liberties.[10] The author thus submits there are no available civil remedies to redress adequately the wrongs caused, and that the State party has failed to adopt adequate measures of compensation, especially for damage resulting from fundamental rights protected under articles 6, 7 and 14. Accordingly, it has breached its obligation to provide effective remedies in article 2, paragraph 3.

5.13 Finally, the author argues that such non-judicial remedies as may be available are not effective because of the extremely serious nature of the violations, and inappropriate in terms of quantum. In the first place, if, as the State party contends, there is no record of the author's complaints to the Philippine Human Rights Commission, this underscores the ineffectiveness and inadequacy of this mechanism, especially in terms of protecting rights under articles 6 and 7 of the Covenant. In any case, the Commission simply provides financial assistance, rather than compensation, and such a non-judicial and non-compensatory remedy cannot be considered an effective and adequate remedy for violations of articles 6 and 7.

5.14 Secondly, the administrative compensation mechanism awarding the author some compensation cannot be considered a substitute for a judicial civil remedy. The Committee has observed that "administrative remedies cannot be deemed to constitute adequate and effective remedies within the meaning of article 2 (3) of the Covenant, in the event of particular serious violations of human rights";[11] rather, access to court is required. In any event, the compensation provided is inadequate in terms of article 14, paragraph 6, and the inability to enter the country renders the remedy ineffective in practice. Even though the P40,000 amount awarded was the maximum amount permissible, it is a token and symbolic amount, even allowing for differences between countries in levels of compensation. After deducting the immigration fees charged, some P18,260 (US$ 343) remained.

Issues and proceedings before the Committee

Consideration of admissibility

6.1 Before considering any claims contained in a communication, the Human Rights Committee must, in accordance with article 87 of its rules of procedure, decide whether or not it is admissible under the Optional Protocol to the Covenant.

6.2 As to the exhaustion of domestic remedies, the State party contends that the author could lodge a complaint with the Philippine Human Rights Commission and a civil claim before the courts. The Committee observes that the author did in fact complain to the Commission while in prison, but received no response to these replies, and that the Commission is empowered to grant "financial assistance" rather than compensation. It further observes that a civil action may not be advanced against the State without its consent, and that there are, under domestic law, extensive limitations on the ability to achieve an award against individual officers of the State. Viewing these elements against the backdrop of the author's exclusion from entry to the Philippines, the Committee considers that the State party has failed to demonstrate that the remedies advanced are both available and effective, and that it is not precluded, under article 5, paragraph 2 (b) of the Optional Protocol, from considering the communication.

6.3 The State party suggests that the Supreme Court's decision and subsequent compensation raise issues of admissibility concerning some or all of the author's claims. The Committee observes that the communication was initially submitted well prior to the Supreme Court's decision in his case. In cases where a violation of the Covenant is remedied at the domestic plane prior to submission of the communication, the Committee may consider a communication inadmissible on grounds of, for example, lack of "victim" status or want of a "claim". Where the alleged remedy occurs subsequent to submission of a communication, however, the Committee may nevertheless address the issue whether there was a violation of the Covenant and then go to the sufficiency of the afforded remedy (see, for example, *Dergachev v. Belarus*).[12] It follows that the Committee regards the events referred to the State party by way of remedy, as relevant to the issues of determination of the merits of a communication and an adequacy of the remedy to be granted to the author for any violations of his Covenant rights, rather than amounting to an obstacle to the admissibility of claims already submitted.

6.4 As to the claim under article 14, paragraphs 1 and 3, of the Covenant, concerning an unfair trial, the Committee observes that these claims have not been substantiated by relevant facts or arguments. Contrary to what is suggested by the author, the Supreme Court did not find the author's trial unfair, but rather reversed his conviction after reassessment of the evidence. Consequently, this part of the communication is inadmissible under article 2 of the Optional Protocol.

6.5 As to the author's claims under article 14, paragraph 2, of the Covenant concerning the presumption of innocence, the Committee observes that events occurring after the point that the author no longer faced a criminal charge, subsequent events fall outside the scope of article 14, paragraph 2. This claim is accordingly inadmissible *ratione materiae* under article 3 of the Optional Protocol.

6.6 Concerning the claim under article 14, paragraph 6, of the Covenant, the Committee notes that the author's conviction was reversed in the ordinary course of appellate review and not on the basis of a new or newly-discovered fact. In these circumstances, this claim falls outside the scope of article 14, paragraph 6 and is inadmissible *ratione materiae* under article 3 of the Optional Protocol.

6.7 In the absence of any further obstacles to admissibility, the Committee regards the author's remaining claims as sufficiently substantiated, for purposes of admissibility, and proceeds to their examination on the merits.

Consideration of the merits

7.1 The Human Rights Committee has considered the present communication in the light of all the information made available to it by the parties, as provided in article 5, paragraph 1 of the Optional Protocol.

7.2 As to the author's claims relating to the imposition of the death penalty, including passing of sentence of death for an offence that under the law of the State party, enacted subsequent to capital punishment having once been removed from the criminal code, carried mandatory capital punishment, without allowing the sentencing court to pay due regard to the specific circumstances of the particular offence and offender, the Committee observes that the author is no longer subject to capital punishment, as his conviction and hence the imposition of capital punishment was annulled by the Supreme Court in late December 1999, after the author had spent almost 15 months in imprisonment following sentence of death. In these circumstances, the Committee considers it appropriate to address the remaining issues related to capital punishment in the context of the author's claims under article 7 of the Covenant instead of separately determining them under article 6.

7.3 As to the author's claims under articles 7 and 10 regarding his treatment in detention and the conditions of detention, both before and after conviction, the Committee observes that the State party, rather than responding to the specific allegations made, has indicated that they require further investigation. In the circumstances, therefore, the Committee is obliged to give due weight to the author's allegations, which are detailed and particularized. The Committee considers that the conditions of detention described, as well as the violent and abusive behaviour both of certain prison guards and of other inmates, as apparently acquiesced in by the prison authorities, are seriously in violation of the author's right, as a prisoner, to be treated with humanity and with respect for his inherent dignity, in violation of article 10, paragraph 1. As at least some of the acts of violence against the author were committed either by the prison guards, upon their instigation or with their acquiescence, there was also a violation of article 7. There is also a specific violation of article 10, paragraph 2, arising from the failure to segregate the author, pre-trial, from convicted prisoners.

7.4 As to the claims concerning the author's mental suffering and anguish as a consequence of being sentenced to death, the Committee observes that the authors' mental condition was exacerbated by his treatment in, as well as the conditions of, his detention, and resulted in documented long-term psychological damage to him. In view of these aggravating factors constituting further compelling circumstances beyond the mere length of time spent by the author in imprisonment under a sentence of death,[13] the Committee concludes that the author's suffering under a sentence of death amounted to an additional violation of article 7. None of these violations were remedied by the Supreme Court's decision to annul the author's conviction and death sentence after he had spent almost 15 months of imprisonment under a sentence of death.

7.5 As to the author's claims under article 9 the Committee notes that the State party has not contested the factual submissions of the author. Hence, due weight must be given to the information submitted by the author. The Committee concludes that the author was not informed, at the time of arrest, of the reasons for his arrest and was not promptly informed of the charges against him; that the author was arrested without a warrant and hence in violation of domestic law; and that after the arrest the author was not brought promptly before a judge. Consequently, there was a violation of article 9, paragraphs 1, 2 and 3, of the Covenant.

8. The Human Rights Committee, acting under article 5, paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights, is of the view that the facts as found by the Committee reveal violations by the Philippines of article 7, article 9, paragraphs 1, 2 and 3, and article 10, paragraphs 1 and 2, of the Covenant.

9. In accordance with article 2, paragraph 3 (a), of the Covenant, the State party is under an obligation to provide the author with an effective remedy. In respect of the violations of article 9 the State party should compensate the author. As to the violations of articles 7 and 10 suffered

while in detention, including subsequent to sentence of death, the Committee observes that the compensation provided by the State party under its domestic law was not directed at these violations, and that compensation due to the author should take due account both of the seriousness of the violations and the damage to the author caused. In this context, the Committee recalls the duty upon the State party to undertake a comprehensive and impartial investigation of the issues raised in the course of the author's detention, and to draw the appropriate penal and disciplinary consequences for the individuals found responsible. As to the imposition of immigration fees and visa exclusion, the Committee takes the view that in order to remedy the violations of the Covenant the State party should refund to the author the moneys claimed from him. All monetary compensation thus due to the author by the State party should be made available for payment to the author at the venue of his choice, be it within the State party's territory or abroad. The State party is also under an obligation to avoid similar violations in the future.

10. Bearing in mind that, by becoming a party to the Optional Protocol, the State party has recognized the competence of the Committee to determine whether there has been a violation of the Covenant or not and that, pursuant to article 2 of the Covenant, the State party has undertaken to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the Covenant, and to provide an effective and enforceable remedy in case a violation has been established, the Committee wishes to receive from the State party, within 90 days, information about the measures taken to give effect to the Committee's Views. The State party is also requested to publish the Committee's Views.

[Adopted in English, French and Spanish, the English text being the original version. Subsequently to be issued also in Arabic, Chinese and Russian as part of the present report.]

Notes

[1] S.11 *Republic* Act 7659 provides that: "… the death penalty shall also be imposed if the crime of rape is committed with any of the following attendant circumstances: 1. When the victim is under eighteen (18) years of age and the offender is a parent, ascendant, stepparent, guardian …".

[2] Case No. 16/1977, Views adopted on 25 March 1983.

[3] Case No. 592/1994, Views adopted on 20 October 1998.

[4] The author refers, by way of example, to *Carballal v. Uruguay* case No. 33/1978, Views adopted on 27 March 1981; *Massiotti v. Uruguay* case No. 25/1978, Views adopted on 26 July 1982; *Marais v. Madagascar* case No. 115/1982, Views adopted on 1 April 1985; *Antonaccio v. Uruguay* case No. 63/1979, Views adopted on 28 October 1971; *Estrella v. Uruguay* case No. 74/1989, Views adopted on 29 March 1983; *Wight v. Madagascar* case No. 115/1981, Views adopted on 1 April 1985; and *Tshisekedi v. Zaire* case No. 242/1987, Views adopted on 2 November 1989.

[5] The author refers to *Philip v. Jamaica* case No. 594/1992, Views adopted on 20 October 1998.

[6] *Pratt & Morgan v. Jamaica* cases Nos. 210/1986 and 225/1987, Views adopted on 6 April 1989.

[7] *Francis v. Jamaica* case No. 606/1994, Views adopted on 25 July 1995.

[8] *Piandiong et al. v. The Philippines* case No. 869/1999, Views adopted on 19 October 2000.

[9] Art. XVI, sect. 3.

[10] C. Sangco: *Philippine Law on Torts and Damages* (1994).

[11] *Bautista Arellana v. Colombia* case No. 563/1993, Views adopted on 27 October 1995.

[12] Case No. 921/2000, Views adopted on 2 April 2002.

[13] *Johnson v. Jamaica* case No. 588/1994, Views adopted on 22 March 1996; *Francis v. Jamaica* case No. 606/1994, Views adopted on 25 June 1995.

I. Communication No. 888/1999, *Telitsin v. Russian Federation* (Views adopted on 29 March 2004, eightieth session)*

Submitted by:	Mrs. Yuliya Vasilyevna Telitsina (represented by the Centre of Assistance for International Protection)
Alleged victim:	Mr. Vladimir Nikolayevich Telitsin
State party:	Russian Federation
Date of communication:	24 October 1997 (initial submission)

The Human Rights Committee, established under article 28 of the International Covenant on Civil and Political Rights,

Meeting on 29 March 2004,

Having concluded its consideration of communication No. 888/1999, submitted by Mrs. Yuliya Vasilyevna Telitsina on behalf of her son, Mr. Vladimir Nikolayevich Telitsin, under the Optional Protocol to the International Covenant on Civil and Political Rights,

Having taken into account all written information made available to it by the author of the communication and the State party,

Adopts the following:

Views under article 5, paragraph 4, of the Optional Protocol

1. The author is Mrs. Yuliya Vasilyevna Telitsina, acting on behalf of her son, Vladimir Nikolayevich Telitsin, a Russian citizen born in 1959 who died on 13 February 1994 during his detention in a correctional labour centre. The author claims that the Russian Federation has violated article 6, paragraph 1, article 7 and article 10, paragraph 1, of the International Covenant on Civil and Political Rights. The author is represented by the Centre of Assistance for International Protection.

The facts as submitted by the author

2.1 On 13 February 1994, Vladimir Nikolayevich Telitsin died as a result of acts of violence while serving a sentence in Correctional Labour Centre No. 349/5, in the town of Nizhny Tagil, in the Urals.

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* The following members of the Committee participated in the examination of the present communication: Mr. Abdelfattah Amor, Mr. Nisuke Ando, Mr. Prafullachandra Natwarlal Bhagwati, Mr. Alfredo Castillero Hoyos, Ms. Christine Chanet, Mr. Franco Depasquale, Mr. Maurice Glèlè Ahanhanzo, Mr. Walter Kälin, Mr. Ahmed Tawfik Khalil, Mr. Rafael Rivas Posada, Sir Nigel Rodley, Mr. Martin Scheinin, Mr. Ivan Shearer, Mr. Hipólito Solari Yrigoyen, Mr. Roman Wieruszewski and Mr. Maxwell Yalden.

2.2 The author says that her son was brutally beaten, hung by a wire and left hanging inside the compound of the Centre. She disputes the view taken by the Correctional Centre authorities and the Nizhny Tagil procurator's office that the death was suicide. She also alleges that in the expert report these authorities deliberately glossed over the violent acts committed against her son. She claims to have seen in person, at the funeral, how her son's body had been mutilated - his nose had been broken and was hanging limply, a piece of flesh had been torn from the right side of his chin, his brow was swollen on the right, blood was coming out of his right ear, the palm of his right hand had been grazed and was a dark purple colour, his spine and back were damaged and his tongue was missing. The author has produced a petition signed by 11 persons who attended the funeral, confirming the condition of the deceased's body as reported above.

2.3 The author requested the Nizhny municipal procurator's office to investigate the circumstances of her son's death. On 13 April 1994, the procurator's office told the author that there was no evidence to support her claims that her son had died as a result of acts of violence, and that it had therefore decided not to initiate criminal proceedings. The author appealed against this decision on three occasions (on 26 April 1994, 20 June 1994 and 1 August 1994), but these appeals were rejected by the Sverdlovsk regional procurator's office in its decisions of 25 May 1994, 30 June 1994 and 31 August 1994, respectively.

2.4 The author also applied to have her son's body exhumed in order to obtain a second opinion, as the conclusions of the initial expert report had, according to Mrs. Telitsina, failed to mention the injuries described above. On 27 October 1994, the Nizhny Tagil procurator's office told the author that any exhumation was subject to the initiation of criminal proceedings, under article 180 of the Criminal Code of the Russian Federation. In the case in point, the author's request could not be met, according to the procurator's office, as the decision of 13 April 1994 by the Nizhny Tagil procurator's office was under review by the Procurator General of the Russian Federation, following an appeal lodged by Mrs. Telitsina.

2.5 On 11 October 1994, the Procurator General of the Russian Federation set aside the decision not to initiate criminal proceedings on the grounds that the circumstances of Mr. Telitsin's death had not been fully examined. He also ordered that all the evidence in the case should be sent to the Sverdlovsk regional procurator's office so that it could carry out additional checks.

2.6 On 14 November 1994, upon completion of this expert report, the Sverdlovsk procurator's office decided not to initiate criminal proceedings and therefore not to exhume the deceased's body. On 7 August 1995 and 10 November 1995, the Sverdlovsk procurator's office informed Mrs. Telitsina that her son's death was the result of a suicidal act provoked by "deviations of a mental nature" and that the injuries the author claimed to have seen on the deceased's body had not been found.

2.7 Following complaints by the author, on 21 September 1995 and 27 February 1996, the Procurator General of the Russian Federation informed her that a thorough investigation had been carried out into the circumstances of her son's death, that her allegations of facial injuries to the deceased had been refuted by the conclusions of the forensic medical report and by statements made by prison staff and prisoners and that the death was the result of suicide.

2.8 According to the author, the examinations carried out were superficial, particularly since the body had not been exhumed, so that the suicide theory advanced by the authorities was invalid.

The complaint

3.1 The author claims that the above facts show a violation by the Russian Federation of article 6, paragraph 1, article 7 and article 10, paragraph 1, of the International Covenant on Civil and Political Rights.

3.2 The author also asserts that all available remedies for the purpose of having criminal proceedings initiated and obtaining a proper expert opinion on the causes of her son's death have been exhausted, as explained above.

Observations by the State party

4.1 In its observations of 10 August 2000, the State party explains that the Office of the Procurator General of the Russian Federation conducted an inquiry into the events relating to this communication.

4.2 From this inquiry, it appears that, according to the report of the forensic medical expert, Mr. Telitsin's death occurred following mechanical suffocation resulting from a slip knot tightening around the organs of the neck. An inspection of the scene of the incident and the body of the deceased showed no signs of a struggle. In the course of the inquiry, particularly when the Office of the Procurator General studied the evidence in the case, special attention was paid to photographs of the deceased, which also showed no sign of physical injury. A superficial graze in the area of the chin could have been caused by a sharp instrument just before, or in the throes of, death. The graze had no causal relationship with the death. In the investigative part of the report, the forensic medical expert points out that there were no injuries to the bones of the fornix or the base of the skull. The State party sees no reason to doubt this conclusion.

4.3 Moreover, the medical expert points out that it has been established that the footprints in the snow that led to the scene of the incident were those of a single person. According to the State party, the deceased was not in conflict with other prisoners or with prison staff. The results of the inquiry therefore corroborate the conclusion of suicide. The State party points out that the request for criminal proceedings to be initiated had been rejected in the absence of a corpus delicti and that the decision had been endorsed by the Office of the Procurator General of the Russian Federation.

Comments by the author on the State party's observations

5.1 In her comments of 25 October 2000, the author says that the State party has not taken into account her assertions - which are neither refuted nor confirmed - that her son's body displayed a large number of injuries, as confirmed by 11 witnesses at the funeral (see paragraph 2.2). The author wonders whether the refusal to exhume the body and to analyse the photographs does not show that the Office of the Procurator General is covering up the murder of her son. She adds that the authorities have no photographs showing the place and manner of her son's hanging, which left him covered in blood and disfigured, but only a rough pencil drawing. Finally, she states that her son's file contains photographs of someone whose face is not that of Vladimir Nikolayevich Telitsin.

5.2 In her comments of 6 July 2001, the author once again rejects the theory of suicide and claims that her son was killed by guards from the Correctional Centre. She also maintains that the photographs mentioned above are a montage that was prepared after she had complained, since they show an injury on the left side of the chin, whereas it was actually on the right-hand side, as described above and confirmed by witnesses. The author repeats her demand to have the photographs analysed. Finally, Mrs. Telitsina states that she was never permitted to read the medical report.

Issues and proceedings before the Committee

6.1 Before considering any claims contained in a communication, the Human Rights Committee must, in accordance with rule 87 of its rules of procedure, decide whether or not it is admissible under the Optional Protocol to the Covenant.

6.2 The Committee notes that the State party has not raised any objections with regard to the admissibility of the communication and that the author has exhausted all available domestic remedies.

6.3 The Committee also considers that the author's complaint that the events she has described constitute violations of article 6, paragraph 1, article 7 and article 10, paragraph 1, of the Covenant has been sufficiently substantiated for the purposes of admissibility and that it deserves to be considered on the merits.

Consideration of the merits

7.1 The Human Rights Committee has considered the present communication in the light of all the information made available to it by the parties, in accordance with article 5, paragraph 1, of the Optional Protocol.

7.2 The Committee has examined all the information provided by both the author and the State party on Mr. Telitsin's death.

7.3 It notes that the State party maintains the theory of suicide on the basis of the report by the forensic medical expert, an inspection of the scene of the incident, a study of the photographs of the deceased and statements by prison staff and prisoners. It also takes note of the author's arguments rebutting the suicide explanation, particularly the absence of photographs of the place and manner of her son's death by hanging and the production by the authorities of photographs that Mrs. Telitsina claims have been manipulated.

7.4 The Committee observes that the State party has not responded to all the arguments put forward by the author in her communication. In particular, the State party has not commented on the testimony of 11 persons who attended Mr. Telitsin's funeral (cf. paragraph 2.2). Nor has the State party produced any document to support its assertion that the photographs of the deceased show no sign of physical injury except for a graze on the chin (cf. paragraph 4.2), despite the specific allegations made by the author about her son's mutilated body. Finally, the Committee takes note of the claim that the author was not permitted to read the medical report and also of the failure to exhume the body of the deceased.

7.5 The Committee regrets that the State party did not respond to or provide the necessary clarification on all the arguments put forward by the author. As far as the burden of proof is concerned, the Committee, in accordance with its jurisprudence, considers that the burden of proof cannot rest solely with the author of the communication, especially when the author and the State party do not have equal access to the evidence and when the State party is often in sole possession of the relevant information, such as the medical report in the case in point.

7.6 Consequently, the Committee cannot do otherwise than accord due weight to the author's arguments in respect of her son's body as it was handed over to the family, which raise questions about the circumstances of his death. The Committee notes that the authorities of the State party have not carried out a proper investigation into Mr. Telitsin's death, in violation of article 6, paragraph 1, of the Covenant.

7.7 In view of the findings under article 6, paragraph 1, of the Covenant, the Committee finds that there was a violation of article 7, as well as of the provisions of article 10, paragraph 1, of the Covenant.

8. The Human Rights Committee, acting under article 5, paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights, finds that the State party violated article 6, paragraph 1, article 7 and article 10, paragraph 1, of the Covenant.

9. Pursuant to article 2, paragraph 3 (a), of the Covenant, the Committee considers that the author, who has lost her son, is entitled to an effective remedy. The Committee invites the State party to take effective measures (a) to conduct an appropriate, thorough and transparent inquiry into the circumstances of the death of Mr. Vladimir Nikolayevich Telitsin; and (b) to grant the author appropriate compensation. The State party is, moreover, under an obligation to take effective measures to ensure that similar violations do not occur again.

10. The Committee recalls that, by becoming a party to the Optional Protocol, the Russian Federation has recognized the competence of the Committee to determine whether there has been a violation of the Covenant or not and that, under article 2 of the Covenant, the State party has undertaken to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the Covenant and to provide an effective and enforceable remedy when a violation has been established. Consequently, the Committee wishes to receive from the State party, within 90 days of the transmission of these findings, information about the measures taken to give effect to the Committee's Views. The State party is also requested to publish the Committee's Views.

[Adopted in English, French and Spanish, the French text being the original version. Subsequently to be issued also in Arabic, Chinese and Russian, as part of the present report.]

J. Communication No. 904/2000, *Van Marcke v. Belgium* (Views adopted on 7 July 2004, eighty-first session)*

Submitted by:	Constant Joseph François van Marcke (represented by counsel, Dirk van Belle, Dauginet & Co., a law firm in Antwerp)
Alleged victim:	The author
State party:	Belgium
Date of communication:	31 January 1999 (initial submission)

The Human Rights Committee, established under article 28 of the International Covenant on Civil and Political Rights,

Meeting on 7 July 2004,

Having concluded its consideration of communication No. 904/2000, submitted to the Human Rights Committee by Constant Joseph François van Marcke under the Optional Protocol to the International Covenant on Civil and Political Rights,

Having taken into account all written information made available to it by the author of the communication, and the State party,

Adopts the following:

Views under article 5, paragraph 4, of the Optional Protocol

1. The author of the communication is Constant Joseph François van Marcke, a Belgian citizen, born on 1 March 1928. He claims to be a victim of violations by Belgium of article 14, paragraphs 1 and 3 (g), of the Covenant. He is represented by Dauginet & Co., a law firm in Antwerp.

The facts as submitted by the author

2.1 In July 1988, a former employee filed a complaint against the author, who was the managing director of *N.V. Interprovinciale stoombootdiensten Flandria*, a shipping company, for fiscal fraud and evasion of income tax. As a result, the Public Prosecutor ordered a preliminary inquiry. Later, on 22 June 1989, the Public Prosecutor ordered the collection of information from the Tax Control Office. The information collected from the Tax Control Office was reflected in police protocol No. 17.375 of 17 November 1989. In the protocol, mention was made of a conversation with a tax officer, who had inquired into the taxes paid by the company in 1987 and 1988, and whose report was annexed to the protocol. According to the author, this was done in violation of article 350 of the Income Tax Code in force at the time, which provided that tax officials could only be heard as witnesses in criminal matters and which prohibited their active participation in a criminal inquiry. On 26 February 1990, the same tax officer reported to the Public Prosecutor breaches of the Tax Code committed by officers in the company.

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* The following members of the Committee participated in the examination of the present communication: Mr. Abdelfattah Amor, Mr. Prafullachandra Natwarlal Bhagwati, Mr. Franco Depasquale, Mr. Maurice Glèlè Ahanhanzo, Mr. Walter Kälin, Mr. Ahmed Tawfik Khalil, Mr. Rajsoomer Lallah, Mr. Rafael Rivas Posada, Sir Nigel Rodley, Mr. Martin Scheinin, Mr. Ivan Shearer, Mr. Hipólito Solari Yrigoyen, Ms. Ruth Wedgwood and Mr. Roman Wieruszewski.

2.2 On 18 June 1990, after completing the preliminary inquiry, the Public Prosecutor laid charges of forgery and fraud against the author and several co-accused. On 19 June 1990, the author was arrested and questioned by the police. According to the author, the Prosecution was waiting for the outcome of the investigation by the Tax Control Office into the tax payments of the company. The Tax Control Office's report was sent to the Judge in charge of the case on 1 April 1992. The case against the author was then referred for trial at the Court of First Instance in Antwerp.

2.3 By judgement of 30 June 1995, the author was convicted of forgery and fraud. On 28 June 1996, the Court of Appeal confirmed the judgement of first instance and sentenced him to a suspended sentence of two years' imprisonment and a fine of 500,000 BEF.

2.4 In its judgement, the Court of Appeal rejected the author's request that the criminal proceedings for fiscal fraud be declared inadmissible or subsidiarily that the tax inspector's 1989 report be removed from the criminal file. It confirmed the finding of the Court of First Instance that the penal inquiry was not initiated because of that report but because of a complaint filed by a former employee. Since the elements of fiscal fraud had been notified to the prosecutor before the tax control report was communicated to him, the Court found that there was no reason to declare the criminal proceedings inadmissible or to remove the report from the file. The Court also rejected the other claims made by the author in relation to alleged violations of the right to fair trial as non-substantiated. In particular, the Court rejected the claim that the tax inspector had been involved in the criminal inquiry in any way and concluded that the cooperation of the tax officials with the penal inquiry had in no way violated the author's rights.

2.5 On 15 April 1997, the Court of Cassation rejected the author's further appeal. With this, all domestic remedies are said to have been exhausted.

2.6 The author petitioned the European Commission of Human Rights. On 19 January 1998, the Commission rejected the author's application as inadmissible.

The complaint

3.1 The author claims that he is a victim of a violation of article 14, paragraph 1, of the Covenant, because of irregularities in the preliminary inquiry: the author alleges that the Prosecution relied on an investigation conducted by the tax inspector in violation of article 350 of the Income Tax Code in force at the time, which provided that tax officials could only be heard as witnesses in criminal matters and which prohibited their active participation in a criminal inquiry. According to the author, the judicial authorities waited for the outcome of the investigation conducted by the inspector of the Tax Control Office before bringing him to trial, and the information provided by the tax inspector was used in the preliminary inquiry against him and formed the main basis for his conviction. Consequently, the author claims that the preliminary inquiry and the trial against him were not impartial, in violation of article 14, paragraph 1, of the Covenant. With regard to the finding of the court that the tax inspector had not been involved in the criminal inquiry the author argues that nevertheless there was an appearance of partiality which in itself constitutes a violation of article 14 (1). Moreover, the author alleges that the participation of the tax inspector in the preliminary inquiry against him violated the confidentiality of the preliminary inquiry.

3.2 Further, the author argues that his right to equal access to information has been violated, because the Court of Appeal refused to have the fiscal file added to the criminal file, although the results of the judicial inquiry were based on or had originated in the conclusions of the fiscal inquiry. The author claims that the Public Prosecutor had access to the fiscal file for information, and that he decided on that basis which investigation to order to obtain evidence against the author. The author acknowledges that he had access to the fiscal file during the fiscal inquiry against him, but argues that norms of fair trial require that the Court also should have had full access to all information used by the Prosecution.

3.3 Finally, the author claims that his right to remain silent as protected by article 14, paragraph 3 (g) was violated. He explains that as a taxpayer he had the obligation to provide correct information on his fiscal situation during the tax control inquiry which took place after the criminal complaint had already been filed against him. He was obliged to provide an answer to all questions asked by the tax administration at the risk of incriminating himself. If he would have refused to cooperate, he would have been subject to fiscal or penal sanctions. Consequently, the author cooperated fully with the tax authorities and provided information. The author states that "even though the results of this fiscal inquiry were not directly used as evidence in the criminal proceedings against the defendant, the results of this obligation to cooperate have contributed at least indirectly to the petitioner's conviction". The author argues that this constitutes a breach of his right to remain silent, as the use of his formal right to remain silent during the criminal proceedings had become illusory because of the information he had earlier provided to the tax authorities and since the tax inspector's report was used in the preliminary inquiry against him. In this context, the author refers to the ECHR judgement in the Saunder case (17 December 1996).

The State party's submission on admissibility and merits

4.1 By submission of 5 December 2000, the State party refers to the decision by the European Commission of Human Rights, dated 19 January 1998, declaring the author's petition inadmissible on the basis that there was no appearance of a violation. The State party emphasizes that the European Commission entered into the merits of the author's complaint and did not reject it for procedural reasons or *ratione materiae*. In particular, the State party states that the jurisprudence of the European system shows that the right to fair trial includes the right to remain silent, and that the rights applied by the European Commission are thus the same as those contained in the Covenant. The State party argues therefore that since the same matter has already been examined by the European Commission of Human Rights, the communication is inadmissible under article 5, paragraph 2 (a) of the Optional Protocol.

4.2 The State party further refers to the Committee's jurisprudence on the matter of exhaustion of domestic remedies, according to which the author should raise the substance of his complaint before the domestic instances. In this context, the State party notes that in his cassation appeal the author did not raise the question of violation of article 14 of the Covenant.

The State party refers to the grounds of cassation introduced on behalf of the author, which refer to article 6, paragraph 1, of the European Convention on Human Rights and article 149 of the Constitution (obligation to provide reasoning for judgements). The State party argues therefore that the claims raised in the present communication were not brought before the domestic courts and that the communication should therefore be inadmissible under article 5, paragraph 2 (b), of the Optional Protocol.

4.3 On the merits, the State party states that the file shows that the author's right under article 14, paragraph 1, to a public hearing by a competent, independent and impartial tribunal established by law, has been fully guaranteed. In respect of the author's allegation that article 350 of the Income Tax Code was violated, the State party argues that it is for the domestic courts to interpret the national laws and to review their application, and that the Committee is not competent to decide on a possible violation of domestic law which is not also a violation of the Covenant. In this context, the State party notes that the right to a confidential preliminary investigation is not included in article 14 of the Covenant nor in article 6 of the European Convention.

4.4 Concerning the author's claim that he did not have a fair trial, the State party refers to the findings of the European Commission in the author's case, which considered that the author had had full opportunity to present all his arguments before the domestic courts, in particular concerning the alleged active participation of the tax inspector. In the opinion of the European Commission, the fact that the author disagrees with the court's conclusions in this respect does not in itself show that the trial against him was unfair. The State party fully shares the views expressed by the European Commission.

Author's comments

5.1 By letter of 14 June 2001, the author comments on the State party's observations in respect of the admissibility of the communication. In reply to the State party's argument that the communication is inadmissible under article 5, paragraph 2 (a), of the Optional Protocol, the author points out that the European Commission of Human Rights rejected his application by decision of 19 January 1998 and that the matter is thus no longer being examined under another procedure of international investigation or settlement. He further notes that the State party has entered no reservation to exclude the Committee's competence in matters that already have been decided by another such procedure. The author concludes therefore that his communication is admissible.

5.2 In reply to the State party's argument that the communication is inadmissible because of non-exhaustion of domestic remedies, the author argues that he raised before the courts the substantive rights protected by article 14 of the Covenant, and that he has exhausted all available remedies in this respect. He refers to the Committee's jurisprudence, according to which a petitioner should raise the substantive rights protected by the Covenant but need not do so by reference to specific articles of the Covenant. He concludes therefore that he has fulfilled the admissibility requirement of article 5, paragraph 2 (b), of the Optional Protocol.

5.3 By letter of 28 June 2001, the author provides comments on the State party's observations on the merits of his communication. With respect to the State party's argument that the Committee is not in a position to review the interpretation and application of domestic law, the author argues that he has invoked article 350 of the Tax Code to argue that the cooperation of the tax inspector in the criminal procedure created at least an impression of active participation leading to a violation of his right to an impartial and fair hearing. The author further states that the Court of Cassation has based its judgement in his case solely on the interpretation of domestic law and has not tested the interpretation against international norms of fair trial. He argues that it is up to the Committee to decide whether the domestic authorities acted in compliance with the Covenant in this respect.

The Committee's admissibility considerations

6.1 Before considering any claim contained in a communication, the Human Rights Committee must, in accordance with rule 87 of its rules of procedure, decide whether or not it is admissible under the Optional Protocol to the Covenant.

6.2 The Committee has noted the State's party's objection to the admissibility of the communication under article 5, paragraph 2 (a) of the Optional Protocol. The Committee observes in this respect that the author's application to the European Commission of Human Rights concerning the same matter was declared inadmissible by the Commission on 19 January 1998 and is thus no longer being examined. In the absence of a reservation by the State party which would exclude the Committee's competence to consider communications that have already been examined by another procedure of international investigation or settlement, the Committee concludes that there is no obstacle to the admissibility of the communication under article 5, paragraph 2 (a) of the Optional Protocol.

6.3 The Committee has also noted the State party's objection to the admissibility of the communication for failure to exhaust domestic remedies because the author failed to invoke article 14 of the Covenant before the domestic courts. In this context, the Committee recalls its jurisprudence that for purposes of the Optional Protocol, the author of the communication must raise the substantive rights of the Covenant before the domestic instances, but need not refer to the specific articles.

6.4 The Committee notes that the author did not raise the issue of the alleged violation of his right to remain silent in his domestic appeals. This part of the communication relating to an alleged violation of article 14, paragraph 3 (g) is therefore inadmissible under article 5, paragraph 2 (b) of the Optional Protocol.

6.5 Noting that the author argued his domestic appeal on the basis of an alleged violation of his right to be heard by an impartial and independent tribunal and on an alleged violation of his right to equal access to information, the Committee considers that the author has exhausted domestic remedies in respect of these remaining claims.

7. The Committee therefore decides that the communication is admissible insofar as it raises issues under article 14, paragraph 1, of the Covenant.

The Committee's consideration of the merits

8.1 The Human Rights Committee has considered the present communication in the light of all the information made available to it by the parties, as provided in article 5, paragraph 1 of the Optional Protocol.

8.2 With regard to the author's allegation that the tax inspector participated actively in the preliminary inquiry and that his reports were used in the criminal case against him, in violation of article 14, paragraph 1 of the Covenant, the Committee notes that the courts rejected the author's claim in this respect and found on the facts that there was no active participation of any tax officials in the criminal case. As established by the Committee's jurisprudence, the Committee is generally not in a position to review the evaluation of facts by the domestic courts. The information before the Committee and the arguments advanced by the author do not show that the Courts' evaluation of the facts was manifestly arbitrary or amounted to a denial of justice. The author has further argued that the appearance of bias in itself constitutes a violation of article 14, paragraph 1, of the Covenant, even if the tax inspector did not participate actively in the criminal case against him. While acknowledging that in certain circumstances the appearance of bias may be such as to violate the right to a fair hearing by an independent and impartial tribunal, the Committee finds that in the present case the facts do not amount to a violation of article 14, paragraph 1 of the Covenant.

8.3 With regard to the author's claim that his right to equal access to information was violated by the courts' refusal to add the fiscal file to the criminal file, the Committee notes that the Court and the author had access to all documents used in the criminal case against him, and that the fiscal file did not constitute the basis of the prosecutor's case before the courts. The fact that information supplied by the fiscal authorities alerted the prosecutor to lines of inquiry for independent investigations did not require that the fiscal file be made part of the prosecution's case. The Committee observes that the right to a fair hearing contained in article 14, paragraph 1, does not in itself require that the prosecution bring before the court all information it reviewed in preparation of a criminal case, unless the failure to make the information available to the courts and the accused would amount to a denial of justice, such as by withholding exonerating evidence. The Committee notes that the author has made no claim that anything contained in the fiscal file would have been exculpatory. In the circumstances of the instant case, the Committee finds that the information before it does not show that the refusal of the courts to join the fiscal file to the criminal case hampered the author's right to defence or otherwise amounted to a violation of his right to fair hearing.

9. The Human Rights Committee, acting under article 5, paragraph 4, of the Optional Protocol, is of the view that the facts before it do not disclose a violation of the International Covenant on Civil and Political Rights.

[Adopted in English, French and Spanish, the English text being the original version. Subsequently to be issued also in Arabic, Chinese and Russian as part of the present report.]

K. Communication No. 909/2000, *Kankanamge v. Sri Lanka*
(Views adopted on 29 July 2004, eighty-first session)*

Submitted by:	Victor Ivan Majuwana Kankanamge (represented by counsel, Mr. Suranjith Richardson Kariyawasam Hewamanna)
Alleged victim:	The author
State party:	Sri Lanka
Date of initial communication:	17 December 1999 (initial submission)

The Human Rights Committee, established under article 28 of the International Covenant on Civil and Political Rights,

Meeting on 27 July 2004,

Having concluded its consideration of communication No. 909/2000, submitted to the Human Rights Committee by Victor Ivan Majuwana Kankanamge, under the Optional Protocol to the International Covenant on Civil and Political Rights,

Having taken into account all written information made available to it by the author of the communication, and the State party,

Adopts the following:

Views under article 5, paragraph 4, of the Optional Protocol

1. The author of the communication, dated 17 December 1999, is Mr. Victor Ivan Majuwana Kankanamge, a Sri Lankan citizen, born on 26 June 1949, who claims to be a victim of a violation by Sri Lanka of articles 2 (3), 3, 19 and 26 of the Covenant. The communication also appears to raise issues under article 14 (3) (c). The author is represented by counsel.

1.2 The Covenant and the Optional Protocol to the Covenant entered into force for the State party on 11 June 1980 and 3 January 1998 respectively. Sri Lanka also made a declaration according to which "[t]he Government of the Democratic Socialist Republic of Sri Lanka pursuant to article (1) of the Optional Protocol recognizes the competence of the Human Rights Committee to receive and consider communications from individuals subject to the jurisdiction of the Democratic Socialist Republic of Sri Lanka, who claim to be victims of a violation of any of the rights set forth in the Covenant which results either from acts, omissions, developments or events occurring after the date on which the Protocol entered into force for the Democratic

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* The following members of the Committee participated in the examination of the present communication: Mr. Nisuke Ando, Ms. Christine Chanet, Mr. Franco Depasquale, Mr. Maurice Glèlè Ahanhanzo, Mr. Walter Kälin, Mr. Ahmed Tawfik Khalil, Mr. Rafael Rivas Posada, Sir Nigel Rodley, Mr. Martin Scheinin, Mr. Ivan Shearer, Mr. Hipólito Solari Yrigoyen and Ms. Ruth Wedgwood.

Socialist Republic of Sri Lanka, or from a decision relating to acts, omissions, developments or events after that date. The Democratic Socialist Republic of Sri Lanka also proceeds on the understanding that the Committee shall not consider any communication from individuals unless it has ascertained that the same matter is not being examined or has not been examined under another procedure of international investigation or settlement".

1.3 On 17 April 2000, the Committee, acting through its Special Rapporteur on new communications, decided to separate the examination of the admissibility from the merits of the case.

The facts as presented by the author

2.1 The author is a journalist and editor of the newspaper "Ravaya". Since 1993, he has been indicted several times for allegedly having defamed ministers and high-level officials of the police and other departments, in articles and reports published in his newspaper. He claims that these indictments were indiscriminately and arbitrarily transmitted by the Attorney-General to Sri Lanka's High Court, without proper assessment of the facts as required under Sri Lankan legislation, and that they were designed to harass him. As a result of these prosecutions, the author has been intimidated, his freedom of expression restricted and the publication of his newspaper obstructed.

2.2 At the time of the submission of the communication, three indictments against the author, dated 26 June 1996 (case No. 7962/96), 31 March 1997 (case No. 8650/07), and 30 September 1997 (case No. 9128/97), were pending before the High Court.

2.3 On 16 February 1998, the author applied to the Supreme Court for an order invalidating these indictments, on the ground that they breached articles 12 (1) and 14 (1) (a) of the Sri Lankan Constitution, guaranteeing equality before the law and equal protection of the law, and the right to freedom of expression. In the same application, the author sought an interim order from the Supreme Court to suspend the indictments, pending the final determination of his application. On 3 April 1998, the Supreme Court decided that the author had not presented a prima facie case that the indictments were discriminatory, arbitrary or unreasonable, and refused him leave to proceed with the application.

The complaint

3.1 The author claims that by transmitting to the High Court indictments charging him with defamation, the Attorney-General failed to properly exercise his discretion under statutory guidelines (which require a proper assessment of the facts as required in law for criminal defamation prosecution), and therefore exercised his power arbitrarily. By doing so, the Attorney-General violated the author's freedom of expression under article 19 of the Covenant, as well as his right to equality and equal protection of the law guaranteed by article 26.

3.2 The author also claims that his rights under article 2, paragraph 3, of the Covenant were violated because the Supreme Court refused to grant him leave to proceed with the application to suspend the indictments and thereby deprived him of an effective remedy.

3.3 Finally, the author claims a violation of article 3, but offers no explanation of that claim.

State party's observations on admissibility

4.1 On 17 March 2000, the State party provided observations only on the admissibility of the communication, as authorized by the Committee's Special Rapporteur on communications pursuant to rule 91 (3) of the Committee's rules of procedure.

4.2 The State party considers the communication inadmissible because it relates to facts that occurred before the Optional Protocol entered into force for Sri Lanka, that is 3 January 1998. Moreover, upon ratification of the Protocol, Sri Lanka entered a reservation by which the State party recognized the competence of the Committee to consider communications from authors who claim to be victims of a violation of the Covenant only as a consequence of acts, omissions, developments or events that occurred after 3 January 1998. The State party submits that, since the alleged violations of the Covenant were related to indictments that were issued by the Attorney-General prior to that date, the claims are covered by the reservation and therefore inadmissible.

4.3 The State party contends that article 19 (3) of the Covenant does not support the author's claim of a violation, because under that provision the exercise of the rights protected carries with it special duties and responsibilities and may be subject to restrictions provided by law which are necessary for the respect of the rights or reputations of others.

4.4 The State party argues that the author has not exhausted all available domestic remedies, which would have included representations to the Attorney-General regarding the indictments, or complaining to the Parliamentary Commissioner for Administration (the Ombudsman) or the National Human Rights Commission.

4.5 Finally, the State party considers that the author cannot invoke the jurisdiction of the Committee under article 2 (3) of the Covenant, because he has not established a violation of any of the rights under the Covenant for which remedies are not available under the Sri Lankan Constitution.

Comments by the author

5.1 On 16 June 2000, the author responded to the State party's observations. On the competence of the Committee *ratione temporis*, and the State party's reservation on the entry into force of the Optional Protocol, he recalls the Human Rights Committee's general comment No. 24, according to which "the Committee has insisted upon its competence, even in the face of such statements or observations, when events or acts occurring before the date of entry into force of the Optional Protocol have continued to have an effect on the rights of a victim subsequent to that date". He affirms that the violations he has alleged are continuing violations, so that the Committee has competence *ratione temporis*.

5.2 By reference to paragraph 13 of general comment No. 24, the author argues that even acts or events that occurred prior to the entry into force of the Optional Protocol for the State party should be admitted as long as they occurred after the entry into force of the Covenant for the State party.

5.3 On the State party's argument that the complaint should be rejected as inadmissible because the restrictions under article 19 (3) of the Covenant are attracted, the author replies that this is not an objection to admissibility but addresses the merits of the communication.

5.4 On the issue of exhaustion of domestic remedies, the author affirms that the Supreme Court is the only authority with jurisdiction to hear and make a finding on infringements of fundamental rights by executive or administrative action. As to representations to the Attorney-General, the author notes that there is no legal provision for making such representation once indictments have been filed, and in any case such representations would not have been effective since the Attorney-General was himself behind the prosecutions. As regards a complaint to the Ombudsman or the National Human Rights Commission, the author stresses that these bodies are appointed by the President of Sri Lanka, and that they are vested only with powers of mediation, conciliation and recommendations but have no powers to enforce their recommendations. Only the Supreme Court is vested with the power to act on his complaint and to grant effective redress.

5.5 In relation to the State party's argument on article 2, paragraph 3, of the Covenant the author argues that a State party cannot invoke its internal laws as a reason for non-compliance with obligations under the Covenant.

Decision on admissibility

6.1 At its seventy-second session, the Committee considered the admissibility of the communication. Having ascertained that the same matter was not being examined and had not been examined under another procedure of international investigation or settlement, the Committee examined the facts that were submitted to it.

6.2 The Committee noted that the State party contested the Committee's competence *ratione temporis* because, upon acceding to the Optional Protocol, Sri Lanka had entered a declaration restricting the Committee's competence to events following the entry into force of the Optional Protocol. In this respect, the Committee considered that the alleged violations had continued. The alleged violations had occurred not only at the time when the indictments were issued, but were continuing violations as long as there had not been a decision by a court acting on the indictments. The consequences of the indictments for the author continued, and indeed constituted new alleged violations so long as the indictments remained in effect.

6.3 As regards the State party's claim that the communication was inadmissible because the author had failed to exhaust domestic remedies, the Committee recalled that the Supreme Court is the highest court of the land and that an application before it constituted the final domestic judicial remedy. The State party had not demonstrated that, in the light of a contrary ruling by the Supreme Court, making representations to the Attorney-General or complaining to the Ombudsman or to the National Human Rights Commission would constitute an effective remedy. The Committee therefore found that the author had satisfied the requirement of article 5, paragraph 2 (b), of the Optional Protocol and declared the communication admissible on 6 July 2001.

6.4 On 6 July 2001, the Committee declared the communication admissible. Whilst it specifically determined that the author's claims under articles 2 (3) and 19 should be considered on the merits, it left open the possibility of considering the author's other claims under articles 3, 14 (3) (c) and 26.

State party's observations on the merits

7.1 On 4 April 2002, the State party commented on the merits of the communication.

7.2 The State party draws attention to the fact that the indictments challenged by the author in his application to the Supreme Court were served during the term of office of two former Attorneys-General. It makes the following observations on certain aspects of the indictments in question:

- Regarding indictment No. 6774/94 of 26 July 1994, further to an article written about the Chief of the Sri Lankan Railway, the State party notes that this indictment was withdrawn and could not be challenged before the Supreme Court, because it had been issued by a different Attorney-General than the one in office at the time of the application to the Supreme Court;
- Regarding indictment No. 7962/96 of 26 June 1996, which related to an article about the Minister of Fisheries, the State party notes that the information on which the article was based was subject to an official investigation, which allegedly confirmed the veracity of the information in question. This was never presented to the Attorney-General and could still be transmitted with a view to securing a withdrawal of the indictment;
- Regarding indictment No. 9128/97 of 30 September 1997, which related to an article about the Inspector General of Police (IGP) and to the alleged shortcomings of a criminal investigation in a particular case, the State party contends that the prosecution acted properly, in the best interest of justice, and in accordance with the relevant legal procedures.

7.3 The State party notes that, in addition to those complaints which led to criminal proceedings, there were nine defamation complaints filed against the author between 1992 and 1997 in relation to which the Attorney-General decided not to issue criminal proceedings.

7.4 The State party underlines that the offence of criminal defamation, defined in section 479 of the Penal Code, may be tried summarily before the Magistrate's Court or the High Court, but no prosecution for this offence may be instituted by the victim or any other person, except with the approval of the Attorney-General. Moreover, for such an offence, the Attorney-General has the right, in accordance with section 393 (7) of the Code of Criminal Procedure, to file an indictment in the High Court or to decide that non-summary proceedings will be held before the Magistrate's Court, "having regard to the nature of the offence or any other circumstances". The Attorney-General thus has a discretionary power under this provision.

7.5 The State party considers that, in the present case, the Attorney-General acted in accordance with the law and his duty was exercised "without any fear or favour", impartially and in the best interest of justice.

7.6 Regarding the Supreme Court's jurisdiction, the State party recalls that leave to proceed for an alleged breach of fundamental rights is granted by at least two judges and that the author was given an opportunity to present a prima facie case of the alleged violations complained about. The Supreme Court, after exhaustively analysing the discretionary power of the Attorney-General and examining the material submitted to it in respect of the numerous complaints against the author, was of the opinion that the indictments served on the author were not arbitrary and did not constitute a continued harassment or an intention to interfere with his right to freedom of expression. In this connection, it took into account four previous indictments against the author, and concluded that they did not amount to harassment, because three were withdrawn or discontinued, and there was nothing to suggest any impropriety on the part of the prosecution. Moreover, during the same period, the Attorney-General had refused to take action on nine other complaints referred to in 7.3 above.

Author's comments

8.1 By submission of 17 June 2002, the author contended that the State party avoided the main issue of his complaint. failing to explain why the Attorney-General decided to file direct indictments in the High Court. In his opinion, the essence of the complaint is that, from 1980, the State party's Government favoured important officials by prosecuting those critical of their actions for defamation - a minor offence otherwise triable by a magistrate - directly in the High Court. In the author's case, while conceding that the Attorney-General's discretion was not absolute or unfettered, the Supreme Court did not call the Attorney-General to explain why he sent these indictments to the High Court. The Supreme Court carefully examined the three contested indictments and summarily refused leave to proceed to his application, which deprived him of the opportunity to establish a breach of the rights to equality and freedom of expression. The author considers that the Supreme Court overlooked that the media exercise their freedom of expression in trust for the public, and that heads of government and public officials are liable to greater scrutiny.

8.2 The author considers that, in its comments on the merits, the State party failed to explain why it believed that the Attorney-General acted "without fear or favour", in the best interest of justice and why a direct indictment was preferred to a non-summary inquiry.

8.3 The author considers that in examining defamation charges, the following elements are relevant:

- The offence is normally tried in the Magistrate Court;
- The Attorney-General's approval is required for filing defamation proceedings in the Magistrate Court;
- The offence is amenable for settlement when tried before the Magistrate Court but not before the High Court;
- Fingerprinting is only done after conviction in the Magistrate Court while it is done in the High Court when the indictment is served - the author was fingerprinted in the course of each of the proceedings against him.

8.4 The author finally submits that the nine cases referred to by the State party in which the Attorney-General declined prosecution is no argument in support of the impartiality of the Attorney-General, since the complainants in these other cases were either not influential, or were opponents to the Government.

8.5 On 25 June 2004, the author's counsel advised that the outstanding indictments had been withdrawn.

Reconsideration of admissibility and examination of the merits

9.1 The Human Rights Committee has considered the present communication in the light of all the information made available to it by the parties, as provided in article 5, paragraph 1, of the Optional Protocol. It considers that no information has been offered by the author in support of his claim of a violation of article 3, and accordingly declares this part of the communication inadmissible for lack of substantiation under article 2 of the Optional Protocol.

9.2 On the merits, the Committee first notes that, according to the material submitted by the parties, three indictments were served on the author on 26 June 1996, 31 March 1997 and 30 September 1997 respectively. At the time of the final submissions made by the parties, none of these indictments had been finally adjudicated by the High Court. The indictments were thus pending for a period of several years from the entry into force of the Optional Protocol. In the absence of any explanation by the State party that would justify the procedural delays and although the author has not raised such a claim in his initial communication, the Committee, consistent with its previous jurisprudence, is of the opinion that the proceedings have been unreasonably prolonged, and are therefore in violation of article 14, paragraph 3 (c), of the Covenant.

9.3 Regarding the author's claim that the indictments pending against him in the High Court constitute a violation of article 19 of the Covenant, the Committee has noted the State party's arguments that, when issuing these indictments, the Attorney-General exercised his power under section 393 (7) of the Code of Criminal Procedure "without any fear or favour", impartially and in the best interest of justice.

9.4 So far as a violation of article 19 is concerned, the Committee considers that the indictments against Mr. Kankanamge all related to articles in which he allegedly defamed high State party officials and are directly attributable to the exercise of his profession of journalist and, therefore, to the exercise of his right to freedom of expression. Having regard to the nature of the author's profession and in the circumstances of the present case, including the fact that previous indictments against the author were either withdrawn or discontinued, the Committee considers that to keep pending, in violation of article 14, paragraph 3 (c), the indictments for the criminal offence of defamation for a period of several years after the entry into force of the Optional Protocol for the State party left the author in a situation of uncertainty and intimidation, despite the author's efforts to have them terminated, and thus had a chilling effect which unduly restricted the author's exercise of his right to freedom of expression. The Committee concludes that the facts before it reveal a violation of article 19 of the Covenant, read together with article 2 (3).

9.5 In light of the Committee's conclusions above, it is unnecessary to consider the author's remaining claims.

10. The Human Rights Committee, acting under article 5, paragraph 4, of the Optional Protocol, is of the view that the facts before it disclose a violation of article 14, paragraph 3 (c), and article 19 read together with article 2 (3) of the International Covenant on Civil and Political Rights.

11. In accordance with article 2, paragraph 3 (a), of the Covenant, the State party is under an obligation to provide the author with an effective remedy including appropriate compensation. The State party is also under an obligation to prevent similar violations in the future.

12. Bearing in mind that, by becoming a party to the Optional Protocol, the State party has recognized the competence of the Committee to determine whether there has been a violation of the Covenant or not and that, pursuant to article 2 of the Covenant, the State party has undertaken to ensure to all individuals within its territory or subject to its jurisdiction the rights recognized in the Covenant and to provide an effective and enforceable remedy in case a violation has been established, the Committee wishes to receive from the State party, within 90 days, information about the measures taken to give effect to the Committee's Views. The State party is also requested to publish the Committee's Views.

[Adopted in English, French and Spanish, the English text being the original version. Subsequently to be issued also in Arabic, Chinese and Russian as part of the present report.]

L. Communication No. 910/2000, *Randolph v. Togo* (Views adopted on 27 October 2003, seventy-ninth session)*

Submitted by:	Mr. Ati Antoine Randolph (represented by counsel, Me. Olivier Russbach)
On behalf of:	The victim
State party:	Togo
Date of communication:	22 December 1999 (date of initial submission)

The Human Rights Committee, established under article 28 of the International Covenant on Civil and Political Rights,

Meeting on 27 October 2003,

Having concluded its consideration of communication No. 910/2000 submitted to the Human Rights Committee by Mr. Ati Antoine Randolph under the Optional Protocol to the International Covenant on Civil and Political Rights,

Having taken into account all written information made available to it by the author of the communication and the State party,

Adopts the following:

Views under article 5, paragraph 4, of the Optional Protocol

1.1 The author of the communication, Mr. Ati Antoine Randolph, born 9 May 1942, has Togolese and French nationality. He is in exile in France and alleges that the Togolese Republic has violated his rights and those of his brother, Emile Randolph, under article 2, paragraph 3 (a); articles 7, 9 and 10; article 12, paragraph 2; and article 14 of the International Covenant on Civil and Political Rights. The author is represented by counsel.

1.2 The Togolese Republic became a party to the Covenant on 24 August 1984 and to the Optional Protocol on 30 June 1988.

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* The following members of the Committee participated in the examination of the present communication: Mr. Abdelfattah Amor, Mr. Nisuke Ando, Mr. Prafullachandra Natwarlal Bhagwati, Mr. Alfredo Castillero Hoyos, Ms. Christine Chanet, Mr. Franco Depasquale, Mr. Maurice Glèlè Ahanhanzo, Mr. Walter Kälin, Mr. Ahmed Tawfik Khalil, Mr. Rafael Rivas Posada, Sir Nigel Rodley, Mr. Ivan Shearer, Mr. Hipólito Solari Yrigoyen, Ms. Ruth Wedgwood, Mr. Roman Wieruszewski and Mr. Maxwell Yalden.

The texts of two individual opinions signed by Committee members Mr. Abdelfattah Amor and Mr. Hipólito Solari Yrigoyen are appended to the present document.

Facts as submitted by the author

2.1 Mr. Randolph first relates the circumstances surrounding the death of his brother, Counsellor to the Prime Minister of Togo, which occurred on 22 July 1998. He claims that the death resulted from the fact that the gendarmerie did not renew his brother's passport quickly enough so that he could be operated on in France, where he had already undergone two operations in 1997. His diplomatic passport having expired in 1997, the author's brother had requested its renewal; the author claims, however, that the gendarmerie confiscated the document. His brother later submitted another application, supported by his medical file. According to the author, no doctor in Togo had the necessary means to undertake such an operation. The gendarmerie issued a passport on 21 April 1998, but the applicant did not receive it until June 1998.

2.2 The author believes that the authorities violated his brother's freedom of movement, which was guaranteed under article 12, paragraph 2, of the International Covenant on Civil and Political Rights, by refusing to renew his passport quickly and by requiring the applicant's physical presence and his signature in a register in order to deliver the passport to him, thereby exacerbating his illness. The author believes that it was as a result of these events that his brother, in a very weakened condition and unable to fly on a regularly scheduled airline, died on 22 July 1998.

2.3 The author of the communication submits, secondly, facts relating to his arrest on 14 September 1985, together with about 15 others including his sister, and their 1986 trial for possession of subversive literature and insulting the head of State. During the period between his arrest and conviction, the author claims, he was tortured by electric current and other means and suffered degrading, humiliating and inhuman treatment. About 10 days after the arrest, the author was reportedly transferred to the detention centre in Lomé, and it was only then, according to the author, that he discovered he had been accused of insulting a public official, a charge that was later changed to insulting the head of State. The author notes in this respect that the head of State had not brought charges against anyone.

2.4 By a judgement on 30 July 1986, the text of which has not been submitted to the Committee, Mr. Randolph was sentenced to five years' imprisonment. The trial, he claims, was unfair because it violated the presumption of innocence and other provisions of the International Covenant on Civil and Political Rights. He has attached extracts from the 1986 report of Amnesty International in support of his claims.

2.5 The author claims that he did not have any effective remedy available to him in Togo. Later, he adds that he did not exhaust all domestic remedies because the Togolese justice system would not allow him to obtain, within a reasonable amount of time, fair compensation for injuries sustained. He claims that, even if he or his family had filed a complaint, it would have been in vain, for the State would not have conducted an investigation. He adds that filing a criminal suit against the gendarmerie would have exposed him and his whole family to danger. Moreover, when he was arrested and tortured, before being sentenced, he had no possibility of filing a complaint with the authorities, who were the very ones who were violating human rights, nor could he file suit against the court that had unfairly convicted him. Mr. Randolph believes that, in these conditions, no compensation for injury suffered would be obtainable through the Togolese justice system.

2.6 After the death of the author's brother in the conditions described above, no one lodged a complaint, according to the author, for the same reasons as he had given before.

2.7 Mr. Randolph believes that, since his release, the injuries caused by the violations of his fundamental rights persist because he has been forced into exile and to live far from his family and loved ones, and also because of his brother's death, which was due to the failure on the part of the Togolese Republic to respect his brother's freedom of movement.

The complaint

3. The author invokes the violation of article 2, paragraph 3; articles 7, 9 and 10; article 12, paragraph 2; and article 14 of the Covenant. He requests fair compensation for the injuries suffered by him and his family as a result of the State's action, and an internationally monitored review of his trial.

The State party's observations

4.1 In its observations of 2 March 2000, the State party considers the substance of the communication without addressing the question of its admissibility. The State party rejects all the author's accusations, in particular those relating to torture, contending that during the trial the accused did not lodge any complaint of torture or ill-treatment. The State party cited the statements made following the trial by the author's counsel, Mr. Domenach, to the effect that the hearing had been a good one and that all parties, including Mr. Randolph, had been able to express their views on what had happened.

4.2 As for calling the trial unfair and alleging a violation of the presumption of innocence, the State party again cites an extract from a statement by Mr. Randolph's counsel, in which he declares that over the 10 months that he has been defending his clients in Togo, he has been able to do so in a satisfactory manner, with the assistance and encouragement of the authorities. He adds that the hearing was held in accordance with the rules of form and substance and in the framework of a free debate in conformity with international law.

4.3 With regard to the violation of freedom of movement, the State party contends that it cannot be reproached for having prevented the author's brother from leaving the country by holding up his diplomatic passport, since the authorities had issued him a new passport. As to the formalities for picking up his passport, it is considered normal to require the physical presence of the interested party, as well as his or her signature on the passport and in the register of receipts; this procedure is in the interest of passport-holders because it is intended to prevent documents from being delivered to a person other than the passport-holder.

4.4 The State party contends that no legal or administrative body has received a claim for compensation for injury suffered by Mr. Ati Randolph.

The author's comments on the observations of the State party

5.1 In his comments of 22 August 2000, the author accuses Togo of having presented "a tissue of lies". He reaffirms the facts as already submitted and insists that he was detained in police custody from 14 to 25 September 1985, while the legally permissible length of such confinement is a maximum of 48 hours. During that period, the author was subjected to cruel, degrading and inhuman treatment, torture and death threats. In his view, the presumption of his innocence was not respected - he was removed from the civil service list, and he was called to appear before the head of State and the Central Committee of the only political party, the one in power. His eyeglasses had been confiscated for three months and had been returned to him only after the intervention of Amnesty International. The author's vehicles had also been confiscated. He claims, in that regard, that one of the vehicles, which was returned to him upon his release, had been tampered with so that he could have died when trying to drive it. Lastly, he comments on various government officials in order to illustrate the undemocratic nature of the current regime, although this is not directly related to his communication.

5.2 From 25 September 1985 to 12 January 1987, the author was detained in the Lomé detention centre, where he was subjected to cruel, inhuman and degrading treatment and death threats. In a statement addressed to the Committee, the author's sister testifies that, in that connection, and under pressure from international humanitarian organizations, the regime was forced to have the prisoner examined by a doctor. Ms. Randolph claims that the lawyers and doctors chosen were loyal to the regime and did not acknowledge that the results - indicating there had been no torture - had been falsified.

5.3 The author's trial began only in July 1986. On 30 July 1986, the author was sentenced to five years in prison for insulting the head of State. On 12 January 1987, he was pardoned by the latter.

5.4 Mr. Randolph insists that he was tortured by electric shock on 15 September 1985 in the evening and on the following morning. He claims that he was then threatened with death on several occasions. He states that he told his lawyers about this, and that he lodged complaints of torture with the court on two occasions: once in October 1985, but his complaint had been diluted by replacing "torture" by "ill-treatment". The second time, in January 1986, he lodged his complaint in writing. In response to this action, the author claims, his right to a weekly family visit was suspended. The author also states that during the trial he had reported the torture and ill-treatment. This had been the reason, according to him, for the postponement of his trial from 16 to 30 July, supposedly for further information; he does not, however, offer any proof of these allegations.

5.5 The author also describes the conditions of his detention, for example, being forced to stay virtually naked in a mosquito-filled room, lying directly on the concrete, with the possibility of showering every two weeks at the start and spending only three minutes a day outside his cell, and having to shower in the prison courtyard under armed guard.

5.6 As for the trial, the author states that the President of the court - Ms. Nana - had close ties to the head of State. She had even participated in a demonstration demanding the execution of the author and the others charged in the case, and the confiscation of their property. Only the Association of African Jurists, represented by a friend of the head of State, had been authorized to attend the trial, while a representative of Amnesty International had been turned away at the airport.

5.7 The author maintains that no incriminating evidence or witnesses had been produced during the course of the trial. The case involved the distribution of leaflets to defame the head of State. Yet, according to the author, no leaflet was submitted in evidence and the head of State had not entered a defamation complaint.

5.8 The author claims that during the trial his attorneys had demonstrated that his rights had been violated. He states that he himself had shown the court the still visible scars from having been burnt with electricity. But in his view the attorneys were under pressure and had therefore not pursued that argument.

5.9 Regarding his brother, the author contests the State party's observations, stating that his diplomatic passport had not been extended but that it had taken nine months to issue a new ordinary passport.

The State party's further observations on the author's comments

6.1 In its note of 27 November 2000, the State party contests the admissibility of the communication. It requests the Committee to declare the communication inadmissible for three reasons: failure to exhaust domestic remedies, use of insulting and defamatory terms and examination of the case by an international instance.

6.2 The State party contends that in Togo any person considering himself or herself to be the victim of human rights violations can have recourse to the courts, to the National Human Rights Commission and to the non-governmental institutions for the defence of human rights. In that connection, the State party states that the author did not submit an appeal to the courts, did not ask for a review of his trial and did not claim compensation for damage of any kind. As for the possible recourse to the National Human Rights Commission, the State party states that the author had not applied to it even though he acknowledged the Commission's importance in his communication.

6.3 The State party insists, without further elaboration, that the author used insulting and defamatory terms in framing his allegations.

6.4 Concerning examination of the case under another international procedure, the State party submits that the United Nations Commission on Human Rights, in its resolution 1993/75 of 10 March 1993, had decided to monitor the situation of human rights in Togo, which it did until 1996. The State party points out that the author's case was among those considered by the Commission on Human Rights during the period of monitoring.

The author's further comments on the State party's observations

7.1 The author submitted his comments on 13 January 2001. Once again criticizing and giving his opinion of various Togolese authorities, he contests the legality and legitimacy of the political regime in power. By way of evidence and in support of his communication, the author submits excerpts from various articles and books, without actually adding any new considerations in support of his previous allegations regarding human rights violations against himself personally or against members of his family.

7.2 He reiterates his comments of 22 August 2000 and makes further accusations against the political regime in office: corruption and denial of justice. He describes the current conditions for the issuance of passports by Togo, although this has no bearing on this communication.

7.3 Concerning the Government's argument of inadmissibility because of the use of insulting and defamatory terms, the author believes that the terms he used were often insufficient to describe "the whole horror in which the Togolese people has been trapped for almost 35 years". He adds that, if the Government still believes that the terms he used were insulting and defamatory, he stood "ready to defend them before any judicial authority, any court of law, and to furnish irrefutable proof and incriminating evidence, producing as supporting witness the Togolese people".

7.4 The author also cites "the denial of justice" as justification for his failure to exhaust domestic remedies. In that connection, the author expounds on the idea that General Eyadema's conception of justice was entirely and exclusively self-serving. The author refers to the "fireworks affair" and asks the head of State "to respond immediately" to questions regarding the discovery and ordering of the explosives and also to explain the failure to produce any incriminating evidence in that case.

7.5 The author gives his opinion of the presiding judge of the court that convicted him, Ms. Nana, as someone close to the Government, and of the first deputy prosecutor, who did not investigate allegations of torture, as well as of others in high positions.

7.6 Regarding the non-exhaustion of available remedies, the author contends that "any attempt to secure a remedy that presupposes an impartial judicial system is impossible so long as the State party has a dictatorship at the helm". Regarding the National Human Rights Commission, his view is that none of the applicants who had submitted complaints to it in 1985 had obtained satisfaction.

7.7 The author submits that the fact that the Commission on Human Rights had concluded its consideration of the situation of human rights in Togo did not preclude the Committee from considering his communication.

Decision of the Committee on admissibility

8.1 Before considering any claims contained in a communication, the Human Rights Committee must, in accordance with rule 87 of its rules of procedure, decide whether or not it is admissible under the Optional Protocol to the Covenant.

8.2 At its seventy-first session in April 2001, the Committee considered the admissibility of the communication.

8.3 The Committee noted that the part of the communication concerning the author's arrest, torture and conviction refers to a period in which the State party had not yet acceded to the Optional Protocol to the International Covenant on Civil and Political Rights, i.e. prior to 30 June 1988. However, the Committee observed that the grievances arising from that part of the communication, although they referred to events that predated the entry into force of the Optional Protocol for Togo, continued to have effects which could in themselves constitute violations of the Covenant after that date.

8.4 The Committee noted that the examination of the situation in Togo by the Commission on Human Rights could not be thought of as being analogous to the consideration of communications from individuals within the meaning of article 5, paragraph 2 (a), of the

Optional Protocol. The Committee referred to its previous decisions, according to which the Commission on Human Rights was not a body of international investigation or settlement within the meaning of article 5, paragraph 2 (a), of the Optional Protocol to the International Covenant on Civil and Political Rights.

8.5 The Committee further noted that the State party contested the admissibility of the communication on the ground of non-exhaustion of domestic remedies, given that no remedy had been sought by the author in respect of alleged violations of rights under the Covenant. The Committee found that the author had not put forward any argument to justify the non-exhaustion of available domestic remedies in respect of his late brother. Consequently, the Committee decided that this part of the communication was inadmissible.

8.6 However, regarding the allegations about the author's own case (paragraphs 2.5, 5.6 and 5.8 above), the Committee considered that the State party had not responded satisfactorily to the author's contention that there was no effective remedy in domestic law with respect to the alleged violations of his rights as enshrined in the Covenant, and consequently it found the communication to be admissible on 5 April 2001.

Observations by the State party

9.1 In its observations of 1 October 2001 and 2002, the State party endorses the Committee's decision on the inadmissibility of the part of the communication concerning the author's brother, but contests the admissibility of the remainder of the communication in respect of the author himself.

9.2 Referring to paragraph 2.5 of the decision on admissibility, the State party reiterates its submission that the author has failed to exhaust domestic remedies, stressing in particular the opportunities to seek a remedy through the Court of Appeal and, if need be, the Supreme Court. The State party notes that it fully shares the individual opinion of one member of the Committee[1] and requests the Committee to take this opinion into account when re-examining the communication.

9.3 With reference to paragraph 5.6 of the decision on admissibility, the State party says that the regime has always respected the principle of the independence of the judiciary and that the author's doubts about the President of the court are gratuitous and unfounded claims made with the sole purpose of defaming her. The State party reiterates that the author's case was tried fairly and openly, in complete independence and impartiality, as the author's own counsel has noted (so the State party claims).

9.4 In connection with paragraph 5.8 of the decision on admissibility, the State party again refers to its observations of 2 March 2000.

Author's comments on observations by the State party

10. In his comments of 3 April, 7 June and 14 July 2002, the author restates his arguments, especially that of the failure by the State party to respect human rights, institutions and legal instruments, and the de facto lack of independence of the judiciary in Togo.

Re-examination of the decision on admissibility and consideration of the merits

11.1 The Human Rights Committee has considered the present communication in the light of all the information made available to it by the parties, in accordance with the provisions of article 5, paragraph 1, of the Optional Protocol.

11.2 The Committee has taken note of the observations of the State party of 1 October 2001 and 2002 regarding the inadmissibility of the communication on the ground of failure to exhaust domestic remedies. It notes that the State party has adduced no new or additional elements concerning inadmissibility, other than the observations which it made earlier at the admissibility stage, which would prompt the Committee to re-examine its decision. The Committee therefore considers that it should not review its finding of admissibility of 5 April 2001.

11.3 The Committee passes immediately to consideration of the merits.

12. Noting the fact that the Optional Protocol entered into force for the State party on 30 June 1988, that is, subsequent to the release and exile of the author, the Committee recalls its admissibility decision according to which it would need to be decided on the merits whether the alleged violations of articles 7, 9, 10 and 14 continued, after the entry into force of the Optional Protocol, to have effects that of themselves constitute a violation of the Covenant. Although the author claims that he has been forced into exile and to live apart from his family and relatives, and although he has after the Committee's admissibility decision provided some additional arguments why he believes that he cannot return to Togo, the Committee is of the view that insofar as the author's submission could be understood to relate to such continuing effects of the original grievances that in themselves would amount to a violation of article 12 or other provisions of the Covenant, the author's claims have not been substantiated to such a level of specificity that would enable the Committee to establish a violation of the Covenant.

13. The Human Rights Committee, acting under article 5, paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights, is of the view that the facts as found by the Committee do not reveal any violation of the Covenant.

[Adopted in English, French and Spanish, the French text being the original version. Subsequently to be issued also in Arabic, Chinese and Russian as part of the present report.]

Note

[1] See appendix.

APPENDIX

Individual opinion of Committee member Mr. Abdelfattah Amor with regard to the decision on admissibility of 5 April 2001

While sharing the conclusion of the Committee regarding the inadmissibility of the part of the communication relating to the author's brother, I continue to have reservations about the admissibility of the rest of the communication. There are a number of legal reasons for this:

1. Article 5, paragraph 2 (b), of the Optional Protocol to the International Covenant on Civil and Political Rights states that: "The Committee shall not consider any communication from an individual unless it has ascertained that the individual has exhausted all available domestic remedies. This shall not be the rule where the application of the remedies is unreasonably prolonged."

Point number one: the onus is on the Committee to satisfy itself that the individual has exhausted all domestic remedies. The Committee's role in the case is to ascertain rather than to assess. The author's allegations, unless they focus on an unreasonable delay in proceedings, insufficient explanations offered by the State party, or manifest inaccuracies or errors, are not such as to necessitate a change in the Committee's role.

Point number two: article 5, paragraph 2 (b), of the Optional Protocol is quite unambiguous and requires no interpretation. It is perfectly clear and restrictive. It is not necessary to go beyond the text to make sense of it, which would mean twisting it and changing its meaning and scope.

Point number three: the sole exception to the rule of exhaustion of domestic remedies concerns unreasonable delay in proceedings, which is clearly not applicable in the present instance.

2. It is undeniable that the sentencing of the author to five years' imprisonment in 1986 was never appealed, either before the author's pardon in January 1987 or at any time afterwards. In other words, from the standpoint of the criminal law, no remedy was ever explored, let alone applied.

3. From the standpoint of the civil law and an action to seek compensation, the author has never, either as a principal party or in any other capacity, gone to court to claim damages, with the result that his case has been referred to the Committee for the first time as an initial action.

4. The author could have referred the case to the Committee with effect from August 1988, the date on which the Optional Protocol came into force with respect to the State party. The fact that he has waited more than 11 years to take advantage of the new procedure available to him cannot fail to raise questions, including that of a possible abuse of the right of submission referred to in article 3 of the Optional Protocol.

5. The Committee lacks accurate, consistent and systematic evidence that would enable it to corroborate the author's allegations about the State party's judicial system as a whole, either as regards its criminal or its civil side. By basing its position on the general absence of effective remedies, as claimed by the author, the Committee has made a decision which, legally speaking, is questionable and could even be contested.

6. It is to be feared that this decision will constitute a vexatious precedent, in the sense that it could be taken to condone a practice that lies outside the scope of article 5, paragraph 2 (b), of the Optional Protocol.

To sum up, I am of the view that, considering the circumstances described in the communication, the author's doubts about the effectiveness of the domestic remedies do not absolve him from exhausting them. The Committee should have concluded that the provision contained in article 5, paragraph 2 (a), of the Optional Protocol had not been satisfied and that the communication was inadmissible.

***(Signed)*: Abdelfattah Amor**

[Adopted in English, French and Spanish, the French text being the original version. Subsequently to be issued also in Arabic, Chinese and Russian as part of the present report.]

Individual opinion of Committee member Mr. Hipólito Solari Yrigoyen (dissenting)

I disagree with the present communication on the grounds set forth below.

12. The Committee notes the fact that the Optional Protocol entered into force for the State party on 30 June 1988, that is, subsequent to the release and exile of the author. At the same time the Committee recalls its admissibility decision according to which it would need to be decided on the merits whether the alleged violations of articles 7, 9, 10 and 14 continued, after the entry into force of the Optional Protocol, to have effects that of themselves constitute a violation of the Covenant. In this regard, the author says that he has been forced into exile and to live apart from his family and relatives. In the view of the Committee, this claim should be understood as referring to the alleged violations of the author's rights in 1985-1987, which relate to such continuing effects of the original grievances that in themselves would amount to a violation of article 12 and other related provisions of the Covenant which permanently prevent his safe return to Togo.

12.1 The Committee observes that in its first presentation, on 2 March 2000, the State party denied that the author had been forced into exile, but that subsequently, after his detailed and specific comments made on 22 August 2000, it has not provided any explanation or made any statement which would clarify the matter, in accordance with its obligations under article 4.2 of the Optional Protocol. By means of a simple statement it could have rebutted the author's claim that he is unable to return safely to Togo and offered assurances regarding his return, but it did not do so. It should be borne in mind that only the State party could offer such guarantees to put an end to the ongoing effects which underlie the author's exile by arbitrarily depriving him of his right to return to his own country. In its presentations made on 27 November 2000 and 1 October 2001 and 2002, the State party confined itself to rejecting the admissibility of the complaint as far as the author is concerned. It should be borne in mind that the State has supplied no new elements which would indicate that the continuing effects of the events which occurred before 30 June 1988 have ceased.

12.2 It is necessary to ask whether the time which elapsed between the date when the Optional Protocol entered into force for the State party and the date when the complaint was submitted might undermine or nullify the argument relating to continuing effects which mean that the author's exile is involuntary. The answer is no, since exiles have no time limits as long as the circumstances which provoked them persist, which is the case with the State party. In many cases these circumstances have persisted longer than the normal human life span. Moreover, it cannot be forgotten that forced exile imposes a punishment on the victim with the aggravating factor that no judge has provided the accused with all the guarantees of due process before imposing the punishment. The punishment of exile, in short, is an administrative punishment. It is in addition a manifestly cruel one, as society has considered since the remotest times because of the effects on the victim, his family and his emotional and other ties when he is forcibly uprooted.

12.3 Article 12 of the Covenant prohibits forced exile, stating that no one shall be arbitrarily deprived of the right to enter his own country. In general comment No. 27, the Committee stated that the reference to the concept of arbitrariness covers all State action, legislative, administrative and judicial. Moreover, the possibility that the author may have dual nationality is of no importance, since, as also mentioned in the general comment, "the scope of 'his own country' is

broader than that of 'his own nationality'. Thus the persons entitled to exercise this right can be identified only by interpreting the meaning of the phrase 'his own country'", which gives recognition to a person's special links with that country.

13. The Human Rights Committee is of the view that the original grievances suffered by the author in Togo in 1985-1987 have a continuing effect in that they prevent him from returning in safety to his own country. Consequently, there has been a violation of article 12, paragraph 4, of the Covenant, read in conjunction with articles 7, 9, 10 and 14.

14. In accordance with article 2, paragraph 3 (a), of the Covenant, the Committee considers that the author is entitled to an effective remedy.

15. Bearing in mind that, by becoming a party to the Optional Protocol, the State has recognized the competence of the Committee to determine whether there has been a violation of the Covenant or not and that, pursuant to article 2 of the Covenant, the State party has undertaken to ensure to all individuals within its territory or subject to its jurisdiction the rights recognized in the Covenant and to provide an effective and enforceable remedy when a violation has been established, the Committee wishes to receive from the State party, within 90 days, information about the measures taken to give effect to the Committee's Views. The State party is also requested to publish the Committee's Views.

***(Signed)*: Hipólito Solari Yrigoyen**
4 December 2003

[Adopted in English, French and Spanish, the Spanish text being the original version. Subsequently to be issued also in Arabic, Chinese and Russian as part of the present report.]

M. Communication No. 911/2000, *Nazarov v. Uzbekistan* (Views adopted on 6 July 2004, eighty-first session)*

Submitted by: Abdumalik Nazarov (represented by counsel, Mrs. Irina Mikulina)

Alleged victim: Abdumalik Nazarov

State party: Uzbekistan

Date of communication: 28 October 1999 (initial submission)

The Human Rights Committee, established under article 28 of the International Covenant on Civil and Political Rights,

Meeting on 6 July 2004,

Having concluded its consideration of communication No. 911/2000 submitted to the Committee on behalf of Abdumalik Nazarov under the Optional Protocol to the International Covenant on Civil and Political Rights,

Having taken into account all written information made available to it by the author of the communication,

Adopts the following:

Views under article 5, paragraph 4, of the Optional Protocol

1.1 The author is Abdumalik Nazarov, a citizen of Kyrgyzstan, born in 1973, and currently serving a term of nine years' imprisonment in Uzbekistan.[1] He claims to be a victim of violations by Uzbekistan of article 10, paragraph 1, article 14, paragraphs 2, 3 (b), (c) and (d), and article 18, paragraph (1), of the International Covenant on Civil and Political Rights. The communication also appears to raises issues under article 9 (3) and article 14 (3) (e). He is represented by counsel.

1.2 The Covenant and the Optional Protocol entered into force in relation to Uzbekistan on 28 December 1995.

The facts as presented by the author

2.1 On the morning of 26 December 1997, the author, together with his father Sobitkhon and brother, Umarkhon, were driving from Kyrgyzstan to Uzbekistan to visit the author's mother.

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* The following members of the Committee participated in the examination of the present communication: Mr. Abdelfattah Amor, Mr. Prafullachandra Natwarlal Bhagwati, Mr. Franco Depasquale, Mr. Maurice Glèlè Ahanhanzo, Mr. Walter Kälin, Mr. Ahmed Tawfik Khalil, Mr. Rajsoomer Lallah, Mr. Rafael Rivas Posada, Sir Nigel Rodley, Mr. Martin Scheinin, Mr. Ivan Shearer, Mr. Hipólito Solari Yrigoyen, Ms. Ruth Wedgwood and Mr. Roman Wieruszewski.

The car was stopped after crossing the border into Uzbekistan, in the village of Vodil in Ferghana province by the militia, who checked their documents and, without providing a reason, searched the car. Although nothing suspicious was found, the militiamen seized the keys to the car, and took the Narazovs to the regional office of the Board of Internal Affairs (BIA), where they were detained. The Nazarovs were told only that they were "under suspicion". The car was then searched for a second time in the presence of the Nazarovs, this time by officers of the BIA, and again nothing was found.

2.2 At about 6.30 p.m. on 26 December 1997, some 10 hours after they were first detained on the border, the Nazarovs were taken to the yard of the BIA offices, and their car was searched again. This time a paper parcel, the contents of which smelled of hemp, was found under a rug in the car. The rug had been in the car during the previous two searches, and earlier there had been a spanner under the rug, which had now disappeared. The paper bag was analysed the following day, and found to contain 12 grams of hemp. On 28 December 1997, the author was charged with possession of narcotics with intent to sell, an offence under s276 of the Criminal Code of Uzbekistan. He was later charged with the further offence of smuggling contraband, contrary to s246 (1) of the Criminal Code. On 30 December 1997, the author's father and brother were released.

2.3 On 27 December 1997, the authorities searched the house of the author's father, and found numerous blank forms with the letterhead of an organization called the "Committee of Asian Muslims". These documents were identified as belonging to the author, and he was charged under article 228 of the Criminal Code with forgery of documents.

2.4 The author claims that the drugs discovered in the car did not belong to him, and that they were "planted" by the authorities to justify his detention. He notes that the authorities had ample opportunity to plant the drugs, as they were in possession of the keys to the car for more than 10 hours. The author argues that, if the drugs had been in the car from the beginning, they would have been found the first time the car was searched, particularly given that the packet smelled so strongly of hemp. The author notes that he is the youngest brother of Sheikh Obidkhon Nazarov, and that he has previously been the subject of adverse treatment from the BIA.

2.5 The author claims that he obtained the documents found in his father's house from an acquaintance, and that he had simply intended to use them to wrap fruit at his stall in the Tashkent city market. Further, he states that the documents are not those of an official body, and cannot therefore be the subject of forgery at law. He notes that Uzbek law criminalizes forgery only of documents which have some official status, and which have some legal bearing on the rights of the person who possesses them. This was not the case in relation to the documents in question.

2.6 On 4 May 1998, the author was convicted by the District Court of Ferghana of the following offences, for which he received the following sentences: smuggling contraband (s246 (1) of the Criminal Code) - seven years' imprisonment; possession of drugs without intent to sell (s276 of the Criminal Code) - two years' imprisonment; and forgery of documents (s228 of the Criminal Code) - two years' imprisonment. The author was sentenced to serve a total of nine years' imprisonment with hard labour, together with confiscation of property.

2.7 The author's appeal to the Court of Appeal of Ferghana District was dismissed on 15 June 1998. A further appeal to the Supreme Court of Uzbekistan was dismissed on 9 September 1999.

2.8 The author claims that there were a number of procedural irregularities in relation to his arrest and trial. He claims that there was no probable cause to detain him, his brother and father on the border, and that their arrest therefore contravened article 221 of the Criminal Procedure Code. He alleges that his initial arrest was confirmed by the relevant authority on 31 December 1997, five days after his detention, which is well beyond the 72 hour limit imposed by the Criminal Procedure Code. In this regard, according to Decree No. 2 of the Plenum of the Supreme Court of the Republic of Uzbekistan, dated 2 May 1997, any evidence obtained in violation of the law cannot be relied on by Courts in arriving at their decisions.

2.9 In addition the Court allegedly did not allow defence counsel to appoint an expert to determine the geographical origin of the hemp. The defence had sought to prove that it had been produced in Uzbekistan, not Kyrgyzstan, and therefore more likely to have been procured by the Uzbek militiamen rather than by the author, who lived in Kyrgyzstan.

The complaint

3. The author claims to be a victim of a violation of article 10, paragraph 1, article 14, paragraphs 2, 3 (b), (c) and (d), and article 18, paragraph (1), of the International Covenant on Civil and Political Rights. Furthermore, he claims that his arrest and detention were unlawful, and that his trial was unfair.

The State party's observations on admissibility and merits

4. In spite of reminders addressed to it on 26 February 2001 and 24 July 2001, the State party has made no submission on the admissibility or merits of the case.

Issues and proceedings before the Committee

Consideration of admissibility

5.1 Before considering any claim contained in a communication, the Human Rights Committee must, in accordance with rule 87 of its rules of procedure, decide whether or not the case is admissible under the Optional Protocol to the Covenant.

5.2 The Committee has ascertained, as required under article 5, paragraph 2 (a), of the Optional Protocol, that the same matter is not being examined under another procedure of international investigation or settlement. Concerning the exhaustion of domestic remedies, the Committee has noted that according to the information submitted by the author, all available domestic remedies have been exhausted. In the absence of any information from the State party the Committee considers that the requirements of article 5 (b) of the Optional Protocol are met.

5.3 The Committee notes that the author's claims under article 14 (3) (b), (c), and (d) are not substantiated by specific details. Thus, there is no explanation as to the adequacy or otherwise of the facilities provided to the author for the purposes of preparing his defence (art. 14 (3) (b)). It transpires from the complaint that the case was heard by the courts of various instances without delay (art. 14 (3) (c)). There is no evidence that the author was deprived of his rights under article 14 (3) (d). On the contrary, from the documents submitted, it appears that the trial was conducted in the presence of the accused and that he was defended by counsel. Accordingly, the Committee finds that these claims have not been substantiated, and are therefore inadmissible pursuant to article 2 of the Optional Protocol.

5.4 Similarly, there is no information in the author's communication to the Committee to substantiate his claims under articles 10 and 18. In particular, counsel has not provided any information about mistreatment of the author by law enforcement officials during the detention period. Similarly, the author has not sufficiently substantiated that his freedom of thought and religion have been affected, and accordingly, the Committee finds these claims to be inadmissible pursuant to article 2 of the Optional Protocol.

5.5 As far as the remaining author's claims under articles 9, paragraph 3, and 14, the Committee considers that they have been sufficiently substantiated for purposes of admissibility, and decides to examine them on the merits.

Consideration of the merits

6.1 The Human Rights Committee has considered the present communication in the light of all the information made available to it by the parties, as provided under article 5, paragraph 1, of the Optional Protocol. It notes with concern that the State party has not provided any information clarifying the matters raised in the communication. It recalls that article 4, paragraph 2, of the Optional Protocol requires that a State party should examine in good faith all the allegations brought against it, and should provide the Committee with all relevant information at its disposal. Given the failure of the State party to cooperate with the Committee on the issues raised, due weight must be given to the author's allegations to the extent they have been substantiated. The Committee notes that the author has made specific and detailed allegations concerning his arrest and trial. The State party has not responded to these allegations.

6.2 In relation to article 9 (3), the author notes that his arrest was confirmed by the relevant authority on 31 December 1997, five days after his detention, however it does not appear that the confirmation of the arrest involved the author being brought before a judge or other authorized judicial officer. In any event, the Committee does not consider that a period of five days could be considered "prompt" for the purpose of article 9 (3).[2] Accordingly, in the absence of an explanation from the State party, the Committee considers that the communication discloses a violation of article 9 (3) by the State party.

6.3 The author further alleges that the State party violated article 14, and points to a number of circumstances which he claims, as a matter of evidence, point clearly to the author's innocence. The Committee recalls its jurisprudence and notes that it is generally not for itself, but for the courts of States parties, to review or to evaluate facts and evidence, unless it can be ascertained that the conduct of the trial or the evaluation of facts and evidence was manifestly arbitrary or amounted to a denial of justice. However in the current case the author claims that the State party violated article 14 of the Covenant, in that the Court denied the author's request for the appointment of an expert to determine the geographical origin of the hemp, which may have constituted crucial evidence for the trial. In this respect, the Committee has noted that in the court decision submitted before it, the court when denying this request gave no justification.

In the absence of any explanation from the State party, the Committee considers that this denial did not respect the requirement of equality between the prosecution and defence in producing evidence, and amounted to a denial of justice. The Committee therefore decides that the facts before it reveal a violation of article 14 of the Covenant.

7. The Human Rights Committee, acting under article 5, paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights, is of the view that the facts before it disclose violations of articles 9 (3) and 14 of the Covenant.

8. Pursuant to article 2, paragraph 3 (a) of the Covenant, the Committee considers that the author is entitled to an appropriate remedy, including compensation and his immediate release.[3]

9. By becoming a State party to the Optional Protocol, the State party has recognized the competence of the Committee to determine whether there has been a violation of the Covenant or not, and that, pursuant to article 2 of the Covenant, the State party has undertaken to ensure all individuals within its territory or subject to its jurisdiction the rights recognized in the Covenant, and to provide an effective and enforceable remedy in cases where a violation has been established. The Committee wishes to receive from the State party, within 90 days, information about the measures taken to give effect to the Committee's Views. The State party is also requested to publish the Committee's Views.

[Adopted in English, French and Spanish, the English text being the original version. Subsequently to be issued also in Arabic, Chinese and Russian as part of the present report.]

Notes

[1] The Optional Protocol entered into force for Uzbekistan on 28 September 1995.

[2] See for example communication No. 852/1999, *Borisenko v. Hungary*, 14 October 2002, where the Committee considered that a three-day period was not "prompt".

[3] See for example *Gridin v. Russian Federation*, communication No. 770/1997, Views adopted 20 July 2000.

N. Communication No. 917/2000, *Arutyunyan v. Uzbekistan*
(Views adopted on 29 March 2004, eightieth session)*

Submitted by: Ms. Karina Arutyunyan (not represented by counsel)

Alleged victim: Mr. Arsen Arutyunyan

State party: Uzbekistan

Date of communication: 7 March 2000 (initial submission)

The Human Rights Committee, established under article 28 of the International Covenant on Civil and Political Rights,

Meeting on 29 March 2004,

Having concluded its consideration of communication No. 917/2000, submitted to the Human Rights Committee by Karina Arutyunyan, on behalf of her brother, Arsen Arutyunyuan under the Optional Protocol to the International Covenant on Civil and Political Rights,

Having taken into account all written information made available to it by the author of the communication, and the State party,

Adopts the following:

Views under article 5, paragraph 4, of the Optional Protocol

1.1 The author of the communication is Karina Arutyunyan, an Uzbek citizen of Armenian origin, currently residing in Italy. She submits the communication on behalf of her brother, Arsen Arutyunyuan, an Uzbek citizen of Armenian origin born in 1979, who at the time of submission of the communication was under sentence of death and detained in Tashkent, awaiting execution. The author claims that her brother is a victim of violations by Uzbekistan[1] of articles 5, paragraph 2; 6, paragraphs 1 and 4; 7; 10, paragraph 1; 14, paragraph 1; 15, paragraph 1; and 17, of the International Covenant on Civil and Political Rights. The author is not represented by counsel.

1.2 Under rule 86 of its rules of procedure, the Committee, acting through its Special Rapporteur on new communications, requested the State party on 22 March 2000 not to carry out the death sentence against Mr. Arutyunyan, while his case is under consideration by the Committee. On 11 May 2000, the State party informed the Committee that on 31 March 2000, Mr. Arutyunyan's death sentence had been commuted to 20 years' imprisonment.

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* The following members of the Committee participated in the examination of the present communication: Mr. Abdelfattah Amor, Mr. Nisuke Ando, Mr. Prafullachandra Natwarlal Bhagwati, Mr. Alfredo Castillero Hoyos, Ms. Christine Chanet, Mr. Franco Depasquale, Mr. Maurice Glèlè Ahanhanzo, Mr. Walter Kälin, Mr. Ahmed Tawfik Khalil, Mr. Rafael Rivas Posada, Sir Nigel Rodley, Mr. Martin Scheinin, Mr. Ivan Shearer, Mr. Hipólito Solari Yrigoyen, Mr. Roman Wieruszewski and Mr. Maxwell Yalden.

The facts as submitted by the author

2.1 Mr. Arutyunyan was a member of the Uzbek rock band "Al-Vakil". On 26 May 1999, he and another member of the band - Mr. Siragev - were arrested in Moscow following a warrant issued by the Uzbek authorities for the murder and robbery in April 1998 in Tashkent, of one Laylo Alieva (a pop star), as well as the attempted murder of her son. They were transferred to Tashkent on 3 June 1999.

2.2 By judgement of 3 November 1999, Messrs. Arutyunyan and Siragev were found guilty of having murdered Mrs. Alieva and robbed her of her jewellery, and were sentenced to death by the Tashkent City Court. On 20 December 1999, the Supreme Court confirmed the judgement.

The claim

3.1 The author claims that following her brother's arrival in Tashkent on 3 June 1999, he was kept in a secret place of detention for two weeks; despite numerous requests, the Office of the Attorney-General refused to communicate his place of detention.

3.2 It is alleged that both Messrs. Arutyunyan and Siragev were mistreated and tortured during the investigation to make them confess, to the extent that Mr. Siragev had to be hospitalized. The author assumes that the same was true of her brother.

3.3 Mr. Arutyunyan's trial is alleged to have been conducted in a biased manner, as the Tashkent City Court based its judgement on his sole confession, in the absence of any witnesses, material proof or fingerprints, and on the depositions of individuals who disappeared shortly after the investigation, which means that their depositions were not reconfirmed before the court. The Supreme Court, allegedly in a mere 35 minute session, validated these alleged procedural mistakes and violations committed by the investigators and the Court of First Instance.

3.4 Allegedly, Mr. Arutyunyan was initially prevented from making use of the services of a counsel hired by his family, under the pretext that no procedural action had yet been initiated. It is alleged that when he was interrogated and confessed his guilt, counsel was assigned to him ex officio, allegedly purely for the sake of form. Later when privately retained counsel was allowed to defend him, they were prevented from meeting in private. Counsel was only allowed to examine the Tashkent City Court's records a few minutes before the beginning of the hearing in the Supreme Court. He was threatened by Mrs. Alieva's family to the point that he resigned and had to be replaced. In this context, it is alleged that Mrs. Alieva's relatives were in high positions in the judiciary. It is alleged that counsel appointed thereafter was also threatened.

The State party's observations

4.1 On 11 May 2000, the State party gave the following information on the case: The Presidium of the Supreme Court examined the case on 31 March 2000 and decided to commute the death sentence of Mr. Arutyunyan to 20 years of imprisonment. Furthermore, by virtue of a Presidential amnesty, the term was reduced "by twenty-five percent" (five years).

Issues and proceedings before the Committee

Consideration of admissibility

5.1 The State party has not responded to the Committee's request, under rule 91 of the rules of procedure, to submit information and observations in respect of the admissibility and merits of the communication, despite several reminders addressed to it. The Committee recalls that it is implicit in article 4, paragraph 2, of the Optional Protocol, that a State party examine in good faith all the allegations brought against it, and that it provide the Committee with all the information at its disposal. In light of the failure of the State party to cooperate with the Committee on the matter before it, due weight must be given to the author's allegations, to the extent that they have been substantiated.

5.2 Before considering any claim contained in a communication, the Human Rights Committee must, in accordance with rule 87 of its rules of procedure, decide whether or not the communication is admissible under the Optional Protocol to the Covenant.

5.3 The Committee notes that the same matter is not being examined under any other international procedure and that domestic remedies have been exhausted. The requirements of article 5, paragraph 2 (a) and (b), of the Optional Protocol have thus been met.

5.4 The Committee has noted the allegation of a violation of the author's brother's rights under articles 5, paragraph 2, 15 and 17, of the Covenant. No information in substantiation of these claims has been adduced, and the author has failed to substantiate these claims, for the purposes of admissibility. Accordingly, the Committee declares this part of the Communication inadmissible under article 2 of the Optional Protocol.

5.5 The Committee finds the claim of a violation of article 5, paragraph 2 of the Covenant inadmissible *ratione materiae* under article 3 of the Optional Protocol.

5.6 The author claims that after the transfer of her brother to Tashkent, his whereabouts were kept secret for two weeks, and that the Office of the Attorney-General did not divulge information on his location. In the absence of any observation by the State party on this issue, the Committee considers that this claim may raise issues under article 10, paragraph 1 of the Covenant, and is therefore admissible.

5.7 The Committee has noted the author's claim that the trial of Mr. Arutyunyan was unfair. While regretting the absence of any observation from the State party in this regard, the Committee notes that this claim primarily relates to the assessment of facts and evidence by national tribunals. It recalls that it is in general for the courts of States parties, and not for the Committee, to evaluate the facts and evidence in any particular case, and to interpret domestic legislation, unless the evaluation was arbitrary or amounted to a denial of justice. The author has not substantiated for the purposes of admissibility that this was the case. In the circumstances, the Committee concludes that this claim is inadmissible under article 2 of the Optional Protocol.

5.8 The Committee has taken note of the allegation that Mr. Arutyunyan was not allowed to be represented by the lawyer of his choice in the initial stages of the investigation; later, his counsel was prevented from consulting the Tashkent City Court's records in preparation of the appeal. In the absence of any pertinent information from the State party in this regard, the Committee declares this part of the communication admissible, in as far as it appears to raise issues under articles 14, paragraph 3 (d), and 6 of the Covenant.

5.9 The author claims that Mr. Arutyunyan was beaten and tortured by the investigators to make him confess, contrary to article 7 of the Covenant. While the State party has not addressed this claim, the author's allegation is vague and general. In the absence of any adequately corroborated information in this regard, the Committee declares this part of the communication inadmissible, as the author has failed to substantiate her claim for the purposes of the admissibility, under article 2 of the Optional Protocol.

Consideration of the merits

6.1 The Human Rights Committee has considered the present communication in the light of all the information made available to it by the parties, as provided in article 5, paragraph 1 of the Optional Protocol.

6.2 The Committee notes the allegation that Mr. Arutyunyan was kept incommunicado for two weeks after his transfer to Tashkent. In substantiation, the author claims that the family tried, unsuccessfully, to obtain information in this regard from the Office of the Attorney-General. In these circumstances, and taking into account the particular nature of the case and the fact that no information was provided by the State party on this issue, the Committee concludes that Mr. Arutyunyan's rights under article 10, paragraph 1, of the Covenant have been violated. In the light of this finding in respect of article 10, a provision of the Covenant dealing specifically with the situation of persons deprived of their liberty and encompassing for such persons the elements set out generally in article 7, it is not necessary to separately consider the claims arising under article 7.

6.3 The author alleges that her brother's right to defence was violated, because once counsel of his choice was allowed to represent him, the latter was prevented from seeing him confidentially; counsel was allowed to examine the Tashkent City Court's records only shortly before the hearing in the Supreme Court. In support of her allegations, the author produces a copy of the lawyer's request for an adjournment, addressed to the Supreme Court on 17 December 1999; this stated that under different pretexts, he had been denied access to the Tashkent City Court's records. This request was turned down by the Supreme Court. On appeal, counsel claimed that he was unable to meet privately with his client to prepare his defence; the Supreme Court failed to address this issue. In the absence of any pertinent observations from the State party on this claim, the Committee considers that article 14, paragraph 3 (d) has been violated in the instant case.

6.4 The Committee recalls its jurisprudence[2] pursuant to which the imposition of a death sentence upon conclusion of a trial in which the provisions of the Covenant have not been respected, constitutes a violation of article 6 of the Covenant, if no further appeal against the death sentence is possible. In Mr. Arutyunyan's case, the final death sentence was pronounced without the requirements for a fair trial set out in article 14 having been met. This results in the conclusion that the right protected under article 6 has also been violated. This violation was remedied by the commutation of the author's death sentence by the Presidium of the Supreme Court, on 31 March 2000.

7. The Human Rights Committee, acting under article 5, paragraph 4, of the Optional Protocol to the Covenant, is of the view that the facts before it disclose a violation of articles 10, paragraph 1, and 14, paragraph 3 (d), of the Covenant.

8. In accordance with article 2, paragraph 3 (a), of the Covenant, the State party is under an obligation to provide Mr. Arutyunyan with an effective remedy, which could include consideration of a further reduction of his sentence and compensation. The State party is also under an obligation to prevent similar violations in the future.

9. Bearing in mind that, by becoming a party to the Optional Protocol, the State party has recognized the competence of the Committee to determine whether there has been a violation of the Covenant or not and that, pursuant to article 2 of the Covenant, the State party has undertaken to ensure to all individuals within its territory or subject to its jurisdiction the rights recognized in the Covenant and to provide an effective and enforceable remedy in case a violation has been established, the Committee wishes to receive from the State party, within 90 days, information about the measures taken to give effect to the Committee's Views. The State party is also requested to publish the Committee's Views.

[Adopted in English, French and Spanish, the English text being the original version. Subsequently to be issued also in Arabic, Chinese and Russian as part of the present report.]

Notes

[1] **The Covenant and the Optional Protocol entered into force for the State party on 28 December 1995.**

[2] ***Brown v. Jamaïque*, case No. 775/1997.**

O. Communication No. 920/2000, *Lovell v. Australia* (Views adopted on 24 March 2004, eightieth session)*

Submitted by:	Mr. Avon Lovell (not represented by counsel)
Alleged victim:	The author
State party:	Australia
Date of communication:	2 December 1999 (initial submission)

The Human Rights Committee, established under article 28 of the International Covenant on Civil and Political Rights,

Meeting on 24 March 2003,

Having concluded its consideration of communication No. 920/2000, submitted to the Human Rights Committee by Mr. Avon Lovell under the Optional Protocol to the International Covenant on Civil and Political Rights,

Having taken into account all written information made available to it by the author of the communication, and the State party,

Adopts the following:

Views under article 5, paragraph 4, of the Optional Protocol

1. The author of the communication dated 21 December 1999, is Avon Lovell, an Australian citizen, currently residing in Greenwood, Western Australia. He claims to be a victim of violations by Australia[1] of article 14, paragraphs 1 and 5, and article 19 of the International Covenant on Civil and Political Rights (the Covenant). He is not represented by counsel.

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* The following members of the Committee participated in the examination of the present communication: Mr. Abdelfattah Amor, Mr. Nisuke Ando, Mr. Prafullachandra Natwarlal Bhagwati, Mr. Alfredo Castillero Hoyos, Mr. Franco Depasquale, Mr. Maurice Glèlè Ahanhanzo, Mr. Walter Kälin, Mr. Ahmed Tawfik Khalil, Mr. Rafael Rivas Posada, Sir Nigel Rodley, Mr. Martin Scheinin, Mr. Hipólito Solari Yrigoyen, Mr. Roman Wieruszewski and Mr. Maxwell Yalden.

Under rule 85 of the Committee's rules of procedure, Mr. Ivan Shearer did not participate in the examination of the case.

A dissenting opinion signed by Committee member Mr. Hipólito Solari Yrigoyen, is appended to the present document.

The facts as submitted by the author

2.1 The author was retained as an industrial advocate by a trade union, the Communications, Electrical, Energy, Information, Postal, Plumbing and Allied Workers' Union of Australia, Engineering and Electric Division, Western Australia Branch (CEPU), when it became involved in industrial action against Hamersley Iron PTY Ltd (Hamersley) in 1992. Hamersley, represented by the law firm Freehill, Hollingdale and Page (Freehill), commenced civil proceedings in the Supreme Court of Western Australia against the CEPU and a number of its officials, seeking injunctions and compensatory damages on a number of grounds. During these proceedings, Hamersley was required to make available for discovery by the CEPU and its officials all relevant documents for which privilege could not be claimed. These documents were obtained and inspected by the author and the CEPU. Included in these documents were five documents, in relation to which Hamersley alleged that the author and the CEPU, by revealing their contents publicly in a radio interview, in newspaper articles and in a series of briefings prepared for distribution to members of the CEPU and other unions, and by using them contrary to the rules of discovery, had committed contempt of court.

2.2 On 22 May 1998, the author and the CEPU were convicted at first instance in the Full Court of the Supreme Court of Western Australia (three judges) on two accounts of contempt of court. The first was the misuse of the five discovered documents, in that the author had used them contrary to the implied undertaking not to use discovered documents which had been obtained from the other party in the civil action in the process of discovery, or to communicate their contents other than for the purposes of the litigation for which the documents were discovered. The second was the interference with due administration of justice, in that the author's conduct, by disclosing the contents of the discovered documents, was intended and placed improper pressure on Hamersley, in regard to the main proceedings, it invited public prejudgement of the issues, and had the tendency to frighten off potential witnesses.

2.3 The author's defence with regard to the first contempt charge, had been, inter alia, that the documents in question, once referred to in open court, had become part of the public domain and there was no limitation any longer on their use; that Hamersley, by responding to the allegations made by the author in reliance on material contained in the discovered documents, had waived its right to confidentiality of the discovered documents; and that publication and use of the documents was consistent with his freedom of political communication protected by the Australian Constitution. On 22 July 1998, the Court fined the author $A 40,000 (plus costs), and the union $A 55,000 (plus costs).

2.4 The author subsequently sought Special Leave to Appeal to the High Court of Australia, on the following grounds:

(a) That the Supreme Court of Western Australia had erred in law by not holding that a reference to discovered documents in open court removed the implied undertaking not to use such documents for purposes extraneous to the litigation;

(b) That the Court should have held that the common law of Western Australia with respect to the use of discovered documents, is consistent with Federal Court Rules and with English Rules;

(c) That in respect of the second contempt charge, the publications did not have any real potential to prejudice or embarrass the trial of any pending cause or action, or to interfere with or impair, the capacity of any court to administer fair and impartial justice;

(d) That the Court had erred in not holding that the freedom of political communication took priority over the law of contempt;

(e) That the fines imposed were manifestly excessive.

2.5 On 29 October 1999, the author was denied Special Leave to Appeal to the High Court of Australia. His application was dismissed on two grounds: first, that there was no sufficient reason to doubt the correctness of the decision of the Full Supreme Court; and secondly, that the case was not considered a suitable vehicle for determining the question of principle sought to be agitated by the applicants because it appeared unlikely that a decision of an appeal would require a determination of that issue. With this, the author claims to have exhausted all domestic remedies.

The complaint

3.1 The author claims that his right to a fair trial under article 14, paragraph 1, was violated. He claims that one of the judges on the Supreme Court of Western Australia raised at least an appearance of bias, as he had previously, as a lawyer, conducted extensive defamation litigations against the author relating to a book that he had written. He was also a former partner of the law firm prosecuting the contempt charge against the author.

3.2 The author also alleges a violation of article 14, paragraph 1, in that the prosecution, referring to Hamersley which initiated the contempt proceedings, was under no duty to act impartially or provide exculpatory evidence, and had a vested interest in obtaining a conviction.

3.3 Furthermore, the author alleges that his right to an appeal, under article 14, paragraph 5, has been violated, arguing that an application for Special Leave to Appeal is not a full appeal, as it deals only with "special leave issues", rather than the grounds of appeal themselves. Furthermore, Special Leave to Appeal is subject to certain conditions, such as public interest or discrete questions of law. His special leave hearing lasted a mere 20 minutes. Accordingly, he maintains that he is left without effective redress against the first instance conviction.

3.4 Finally, the author contends that his conviction for contempt has prevented him from exercising, as a journalist, his rights under article 19 of the Covenant, in that he was convicted and fined for publishing documents that had been referred to in an open court. In this context, he refers to the alteration of the English Supreme Court Rules following the so-called "Harman case" in the United Kingdom, which is mirrored in the Federal Court jurisdiction in Australia and in the States of New South Wales and South Australia, and which implies that documents that have been read to or by an open court in open public session have ceased to be protected by an implied undertaking not to use them.

The State party's submission on the admissibility and merits of the communication

4.1 By note verbale of 10 October 2000, the State party made its submission on the admissibility and merits of the communication. It submits that the author's claims under article 14, paragraph 1, should be declared inadmissible for non-exhaustion of domestic remedies, since he failed to raise the question of impartiality before domestic courts, and for failure to substantiate his claim in that he does not allege or disclose evidence of actual bias on the part of Justice Anderson, and that his allegation of an absence of duty on the opposing party to act in a particular way does not come within the terms of article 14, paragraph 1.

4.2 With regard to the author's claim that his right to review by a higher tribunal was infringed by the High Court's refusal to grant Special Leave to Appeal, the State party submits that the author has failed to substantiate his claim, that it is incompatible with the Covenant, and, in the alternative, with regard to the second charge of contempt, that he has not exhausted domestic remedies. This claim should therefore also be declared inadmissible.

4.3 Furthermore, the State party submits that the author has failed to substantiate his claim that the law of contempt was used to prevent him from exercising his rights under article 19 of the Covenant. In the alternative, should the Committee consider the author's allegations admissible, it submits that each of the claims should be dismissed as unmeritorious, since the author has failed to submit evidence to substantiate his claims.

The author's claim under article 14, paragraph 1

4.4 The State party submits that the author advances two allegations under article 14, paragraph 1, of the Covenant: first that he did not receive a hearing by an impartial tribunal;[2] and second, that in the circumstances of the case where the opposing party was not required to act impartially or divulge exculpatory material, he did not receive a fair hearing.

The author's claim that he did not receive a hearing by an impartial tribunal

4.5 With regard to the allegation that the author did not receive a hearing by an impartial tribunal because one of the judges on the Full Supreme Court had been a former adversary and a member of the law firm responsible for prosecuting the contempt charge, the State party submits that the author failed to raise this claim before the domestic courts, and that it should be declared inadmissible under article 5, paragraph 2 (b), of the Covenant.[3]

4.6 Since the author's allegation of impartiality is based on the presence of Justice Anderson on the bench of the Full Supreme Court, it is clear that the author knew that Justice Anderson was on the bench before the commencement of the trial. The State party submits that there have been three discrete instances of failure to exhaust domestic remedies. First, the author did not apply to have Justice Anderson excuse himself, or to the Full Supreme Court to disqualify Justice Anderson, at any time before or during the hearing of his contempt charges. To the extent that the author allowed the hearing to proceed after becoming aware of this information, he may also be seen as having implicitly accepted that no issue of bias arose.

4.7 Secondly, the author failed to apply to the Full Supreme Court for a review or a reopening of the case after the decision in his case was delivered, on the ground that the decision was impugnable because of Justice Anderson's participation in the deliberations.

4.8 Finally, the author failed to apply to the High Court for a review and/or setting aside of the decision of the Full Supreme Court on the basis of Justice Anderson's participation.

The State party notes that the author was represented by experienced senior counsel in the proceedings before the High Court, and that his failure to raise the question of the impartiality of Justice Anderson is demonstrative of a failure to exhaust available domestic remedies.

4.9 In the alternative, the State party submits that the communication should be declared inadmissible for non-substantiation under article 2 of the Optional Protocol, since the author submitted insufficient evidence that would constitute a prima facie case. In respect of the first claim of bias, that is that Justice Anderson was a party to the case or had disqualifying interest therein, the State party submits that although Justice Anderson had 16 years earlier been a member of the law firm representing Hamersley in the contempt proceedings, the author has not submitted any allegation or evidence that he had any relationship or disqualifying interest with Hamersley.

4.10 In respect of the second claim of bias, that is where circumstances would lead a reasonable observer, to reasonably claim bias, in this case based on the fact that Justice Anderson, had previously been involved in litigation against the author and that he had previously been a member of the firm involved in contempt litigation against the author, it submits that the communication discloses no evidence of partiality. The alleged involvement of Justice Anderson in litigation against the author is not sufficiently particularized to enable identification of the alleged specific action or actions.

4.11 If the Committee considers the claim of impartiality admissible, the State party submits that it should be dismissed as unmeritorious, since the author has not submitted allegations or evidence of actual bias on the part of Justice Anderson. The State party repeats that the firm of which Justice Anderson had been a member cannot properly be seen as a party to the author's case. In any case, Justice Anderson had no connection with that firm for 16 years, so that he could not be seen to be sharing an interest with it. It submits that it is highly probable that Justice Anderson, a member of the bar, had been retained on numerous occasions both for and against his former firm (one of Australia's largest firms), and that, while sitting as a judge of the Supreme Court of Western Australia, had heard many cases in which his former firm had played a role. It notes that the author has not displayed any indication of partiality towards his former firm, or that he retains a commonality of interest with the firm. The State party also emphasizes that it is common practice in Australia to appoint judges whose background includes extensive private legal practice, and it is therefore normal that judges will have an extensive history of involvement in litigation with a range of clients and a number of private legal firms.

4.12 The State party submits further that the author has not presented evidence sufficient to establish that any reasonable observer would reasonably doubt the partiality of Justice Anderson, given the presumption that a judge is able to bring an unprejudiced mind to each case. Further, even if a reasonable observer might entertain reasonable doubts as to the impartiality of Justice Anderson, this should not necessarily lead to the conclusion that the author's hearing was unfair. It refers to the jurisprudence of the European Court of Human Rights,[4] which has held that it is necessary to look at the whole of the proceedings to determine the fairness of a trial and has noted that an apprehension of partiality in respect of one member of a tribunal might be counterbalanced by other members of the tribunal whose impartiality is not in question. The State party notes that the author made no allegation of bias against the two other justices of the Full Supreme Court.

The author's claim that the prosecutor was not required to act impartially or provide exculpatory evidence

4.13 In respect of the author's claim that although he was subjected to criminal proceedings, there was no duty on the prosecutor - that being the firm bringing the application for the finding of contempt against him - to act impartially or to provide exculpatory evidence, the State party submits that the author misunderstood the nature of the proceedings against him. First, the firm of solicitors did not act as prosecutors against the author, but as solicitors claiming, on behalf of their client, that his rights to the confidentiality of material disclosed by discovery for the purposes of court proceedings and to a fair trial of the main proceedings, had been infringed by the author. Secondly, it submits that the author is only partly correct in saying that the contempt arose from civil matters, since while the contempt of misuse of documents was civil contempt; the interference with the due administration of justice gave rise to criminal contempt. However, the differences between civil and criminal contempt has limited relevance in terms of procedure under Australian law, since all proceedings for contempt are criminal in nature and must be proven beyond reasonable doubt. The State party submits that the author's communication is misconceived in that he is complaining that he has not been afforded the benefit of a higher degree of proof.

4.14 The State party submits that the author has failed to exhaust domestic remedies, since he did not bring this claim before any domestic tribunal, and that in particular he could have raised it before the Full Supreme Court of Western Australia or the High Court of Australia.

4.15 It further considers that the author's allegation that his hearing was unfair because there was no duty on the opposing party to act impartially or to hand over exculpatory material does not fall readily within any of the minimum guarantees in article 14, paragraph 3. The allegations of unfairness resulting from restricted access to documents held by prosecuting authorities have been made in other cases under article 14, paragraph 3 (b), relating to the requirement of adequate facilities for the preparation of the defence, and refers to the Committee's decision in *O.F. v. Norway*.[5] However, the author makes no allegation that documents were withheld from him, only that the opposing party had no duty to hand over documents that might have existed and might have been exculpatory. As article 14 does not give an absolute right of access to materials in the hands of the other party, and since, consequently, it does not impose a duty upon States parties to the Covenant to ensure that there is a duty for litigants correlative to this right, the State party submits that the author's allegation is incompatible with any of the rights recognized by the Covenant and should be declared inadmissible under article 3 of the Optional Protocol.

4.16 Furthermore, it submits that the author has failed to substantiate his allegations for the purpose of admissibility, since he asserts that there was no duty on the prosecutor to act impartially or to provide exculpatory evidence, but fails to allege that the opposing party did not act impartially, that it failed to provide exculpatory evidence, that there was in fact any exculpatory evidence in its hands, or that possible exculpatory material may have afforded him a better opportunity to present his defence.

4.17 If the Committee considers the claim admissible, the State party submits that it is unmeritorious, since the author failed to substantiate his claim and identify any particular unfairness in relation to conduct of the contempt proceedings.

The author's claim under article 14, paragraph 5

4.18 The State party submits that its regulation of appeals heard by the High Court does not preclude effective access to that court by applicants seeking review of decisions made by lower courts. It refers to the jurisprudence of the former European Commission of Human Rights, which has held that it is sufficient to limit a right of appeal to questions of law.[6] It also notes that the Committee, in a previous case, *Perera v. Australia*,[7] observed that article 14, paragraph 5, does not require an appellate court to proceed to a factual retrial, but that a court must conduct an evaluation of the evidence presented at the trial and of the trial conduct. In that case, the author claimed that his rights under article 14, paragraph 5, were violated, since an appeal could only be heard on points of law and allowed no rehearing of facts.

4.19 The State party contends that the High Court of Australia is the most appropriate body to determine whether or not there are sufficient grounds for granting Special Leave to Appeal, and to the extent that the Committee would assess the substantive correctness of the High Court decision, it would exceed its functions under the Optional Protocol. The State party invokes the Committee's decision in *Maroufidou v. Sweden*.[8]

4.20 An appeal from an intermediate court shall not be brought unless the High Court grants Special Leave to Appeal. The parties may, in that case, appear and present an oral argument of 20 minutes each, plus a 5-minute reply by the applicant, and eventual extended time as the High Court deems fit. In considering whether to grant an application for Special Leave to Appeal, the High Court may, according to the Judiciary Act, section 35A, hear any matters that it considers relevant but shall have regard to:

> *"(a) Whether the proceedings in which the judgement to which the application relates was pronounced, involve a question of law:*
>
> *(i) That is of public importance, whether because of its general application or otherwise; or*
>
> *(ii) In respect of which a decision of the High Court, as the final appellate court, is required to resolve differences of opinion between different courts, or within the one court, as to the state of law; and*
>
> *(b) Whether the interests of the administration of justice, either generally or in the particular case, require consideration by the High Court of the judgement to which the application relates."*

4.21 The requirement for Special Leave to Appeal was instituted in 1984, partly due to the unmanageable volume of work facing the High Court, and partly due to the fact that appeals as of right to the High Court often involved issues of fact with which it was inappropriate to burden the highest appellate court with.

4.22 The State party contests the admissibility of the author's allegation under article 14, paragraph 5, on the basis that he failed to substantiate his claim and that his claim is incompatible with this provision. It contends that the author had access to the High Court[9] in that he had access to the reasoned judgement of the court from which appeal was sought; he had sufficient time to prepare his appeal; he had access to counsel; and he was entitled to, and did, make submissions to the Court. In respect of the time limit of 20 minutes, the State party notes that this limit is comparable to that allowed for parties to substantive appeals in other jurisdictions, and that, in any case, his counsel could have but did not request an extension of the time limit, and did not even exhaust the 20 minutes.

4.23 It further observes that no issue arises from a limitation of appeals to questions of law, as alleged by the author, because, firstly, the author did not seek to raise any questions requiring consideration of the facts of his case, and secondly, an application for Special Leave to Appeal to the High Court is not exclusively restricted to questions of law, although the fact that no legal questions are raised on an appeal is one factor that may induce the High Court to dismiss an application.

4.24 Finally, the State party submits that the author's claim relating to the second charge of contempt that is the interference with the due administration of justice, should be declared inadmissible for non-exhaustion of domestic remedies, since he did not seek a review of the Supreme Court's finding on this contempt charge.

The author's claim under article 19

4.25 The State party submits that the law of contempt protects both the right of individuals in proceedings to privacy, and is necessary to maintain public order by ensuring the proper administration of justice. Any interference with the administration of justice or impairment of the capacity of the court to administer impartial justice is therefore a contempt of court and unlawful. It observes the duties and responsibilities these rights carry, and invokes the Committee's jurisprudence in *Ballantyne et al. v. Canada* and *Jong-Kyu Sohn v. The Republic of Korea.*[10] Furthermore, it refers to the European Court of Human Rights' relevant practice of the similar article, in 10, paragraph 2 of the European Convention.[11]

4.26 The State party observes that the discovery process is an essential part of the proper administration of justice, in that it allows the truth to be ascertained in litigation. Under domestic law, the High Court of Australia has held that "*In relation to documents produced by one party to another in the course of discovery in proceedings in a court, there is an implied undertaking, springing from the nature of discovery, by each party not to use any document disclosed for any purpose otherwise than in relation to the litigation in which it is disclosed.*"

4.27 In respect of the author's reference to the alteration of the English Supreme Court Rules after the "Harman case" in the United Kingdom, which state that "*Any undertaking whether express or implied not to use a document for any purposes other than those of the proceedings in which it is disclosed shall cease to apply to such document after it has been read to or by the court, or referred to, in an open court, unless the court for special reasons has otherwise ordered.*", the State party notes that the Western Australian Supreme Court does not have a similar order. According to the Australian High Court, "*the implied undertaking is subject to the qualifications that once the material is adduced in evidence in court proceedings it becomes part of the public domain unless the court restrains publication of it*". The State party submits that "*adduced in evidence*" is tendered material held to be admissible and admitted in evidence.

4.28 The State party submits that the author has not submitted sufficient evidence to substantiate his allegations, and that the case should be declared inadmissible under article 2 of the Optional Protocol. The author does not make any specific allegation of a violation of article 19, and does not specify how his conviction for contempt of court relates to any prevention of his exercise of freedom of expression under article 19 or any effect upon him in his capacity as a journalist and a writer.

4.29 If the Committee were to find this claim admissible, the State party submits that it should be dismissed as unmeritorious, since the law of contempt is a permissible restriction of the right to freedom of expression in that it meets the conditions set out in article 19. The purpose of the law is to ensure that the interference with an individual's private rights brought about by the discovery process, namely the invasion of privacy, is balanced by the requirement to use the documents only for the purpose of the litigation in which it is discovered. Where documents are obtained as a result of the discovery process, the obligation to use them only for the current proceedings is an obligation owed to the court, for the benefit of the parties and the benefit of the public in maintaining a fair and effective system of justice. In determining whether the law of contempt is necessary to protect due administration of justice and the rights of individuals to privacy, due weight is given to the fact that the obligation to restrict the use of material obtained as part of the discovery process is not absolute, and is qualified by (a) the court granting leave for the proposed use or disclosure, (b) the person from whom the information was obtained consenting to the use or disclosure, or (c) the information being admitted into evidence in open court. A conviction for contempt of court will not be found lightly but requires an appropriate balance between the broad right to freedom of expression and the narrow exceptions to it.

4.30 The State party submits that the author knew that the documents were obtained through the discovery process in the action between CEPU and Hamersley, and was responsible for using five of them for purposes other than litigation, thereby breaching the implied undertaking not to disclose their contents. The author asserted, as part of his defence, that the documents had been read out in open court and fell under the qualification to the law of contempt of documents adduced as evidence. But the only reason those documents were referred to in court was that the author and the CEPU applied for leave to adduce documents obtained as a result of the discovery process. However, this application was denied and the documents were not adduced in evidence. Furthermore, when the reference to these documents was made in open court for the purposes of determining the procedural application, they were not read aloud and no party other than the parties to the proceedings was present. Therefore the reference to these documents had no bearing on the validity of the implied undertaking.

4.31 The State party notes the author's argument that implied freedom of political communication under the Australian Constitution overrides the implied undertaking not to use the discovered documents for purposes other than the proceedings in which they were discovered. It contends that the exceptions referred to above also are justified in relation to freedom of political communication.

The author's comments

5.1 In his comments of 28 December 2000, the author submits in respect of his claim that one of the judges was biased against him, that at the time of the Supreme Court hearing, he did not know that this judge was a former member of the law firm representing his adversary on the contempt procedure, nor that he had been appointed to write the lead judgement, and he could not therefore raise the question of bias. He submits that a Full Court will not review the decision of another Full Court, and he could therefore not have raised this claim before the Full Supreme Court of Western Australia. However, bias not having been raised at first instance, there was no other avenue of appeal available, and this point could not be raised in the Special Leave to Appeal application.

5.2 The author contends that the allegedly biased judge still maintains connections with his former law firm, through an investment company owned by partners of the firm.

5.3 With regard to his claim that the prosecutor was partial, the author contests the State party's submission that he has been afforded the benefit of a higher degree of proof, since there was no *viva voce* evidence presented in the High Court and there was no cross-examination. He reaffirms that the law firm Freehill, in the contempt proceedings against him acted, as a prosecutor without impartiality. At the time of his submission, an application had been heard in the main action (in which the contempt charges arose) in the Supreme Court to dismiss the plaintiff's action as an abuse of the process, partly on the basis of evidence that Freehill acted as advisers for political and industrial purposes.

5.4 As to the exhaustion of domestic remedies of his claim that the prosecutor was partial, the author contends that the issue of impartial prosecutor only became manifest upon delivery of the Supreme Court judgement, and that it was an inherent part of the Special Leave to Appeal application that the process was unfair. With regard to the State party's contention that the minimum guarantees in article 14, paragraph 3, do not oblige the opposing party to act impartially or to hand over exculpatory material, the author contends that it is the duty of a prosecutor to provide factual and exculpatory evidence, and that it cannot be ascertained that this right was respected insofar as his adversary's counsel acted as prosecutor.

5.5 Concerning the alleged violation of article 14, paragraph 5, the author submits that a conviction for contempt is the only one in Australia where a review by way of appeal is not available at a lower level, so that facts and law are teased out well before a Special Leave application to the High Court. He contends that the High Court did not conduct an evaluation of the evidence presented at the trial; it considered the Special Leave threshold requirements and was limited to such considerations.

5.6 With regard to the State party's submission that he did not exhaust domestic remedies in respect of the conviction for contempt of interference with due administration of justice, the author refers to his Amended Draft Grounds of Appeal, in which grounds Nos. 4, 6 and 7 relate to the contempt of interference with justice, and to the Applicant's Amended Summary, which also refers to this form of contempt. He recalls that further oral submissions relating to the appeal of this contempt were made on his behalf. The High Court did not consider this part of the appeal.

5.7 The author submits that the law of contempt is powerful because it gives to a civil litigant the power and interest of the State, and that it was misused in his case, in order to restrict his right to freedom of expression. The acts for which he was convicted are lawful in other Australian states in matters lying within the jurisdiction of the Australian Federal Court, and when a matter arises in a court in Australia and there is no guidance in law or precedent in Australia, the law and the precedent of the United Kingdom usually is relied upon as guidance.

There is no reference at all in the Rules of the Western Australian Supreme Court about discovered documents. Furthermore, in the absence of a submission from counsel, a court will, and usually does, inform itself of such law and precedent so as to arrive at a just decision. The author, therefore, contests the State party's submission that because the Supreme Court of Western Australia does not have a rule similar to the United Kingdom, the pre-Harman law prevails. Neither the United Kingdom rule nor the Australian Federal Court Rules contain any reference that the documents must be adduced in evidence in order for an undertaking not to disclose the evidence cease to apply.

5.8 The author submits that in February 1998, Hamersley initiated additional contempt proceedings against him. A trial commenced in June 2000, but was adjourned on an interlocutory point, and was to be continued in February or March 2001. These proceedings, and the probability of a sentence of imprisonment, have silenced him on matters of public interest.

5.9 To the State party's submission that he could have applied to the court for permission to use the documents, the author contends that this point was raised in the contempt hearing. His response was that in the event that he made such an application, and it had been granted, the plaintiff would have appealed the decision and he would not have had access to the documents in one or two years. This would, in his opinion, be incompatible with his understanding as a journalist that the documents were produced in open court without objection, and were quoted verbatim by him from transcripts of those proceedings.

5.10 Finally, the author refers to the application by Harman to the European Court of Human Rights against the United Kingdom concerning the above issue under the law of contempt, which was under consideration by the ECHR when the United Kingdom agreed to enter into a friendly settlement to change the law. Consequently the Rules of the Federal Court of Australia were changed.

The State party's comments

6.1 By note verbale of 15 May 2001, the State party further responded to the author's comments, and withdrew its submission that the author had not exhausted domestic remedies with respect to article 14, paragraph 5, of the Covenant.

6.2 In respect of the author's allegation that he was unaware who the Supreme Court judges were, it submits that yet as soon as he entered the courtroom and saw the alleged biased judge, he could apply for the judge to excuse himself. However he did not raise the question of bias until he lodged his communication to the Committee. In this respect, it also submits that the presiding judges agree on who will write the lead judgement, and that there is no evidence to suggest that the two other judges had not considered the case on its merits and wrote their judgements accordingly.

6.3 In respect of the author's allegation that a Full Court will not review the decision of another Full Court, the State party submits that the Full Court of the Supreme Court of Western Australia, as a superior court of record, has inherent jurisdiction to set aside any order or judgement where there has been a failure to observe an essential requirement of natural justice.

6.4 In respect of the author's reference to the fact that Justice Anderson was an office holder in an investment company established by Freehill, the State party contends that there is no evidence or claim that this company has a present connection with the judge which would give rise to a suspicion of bias.

6.5 With regard to the author's implied allegation that because the evidence of the contempt trial was by affidavit, there was no opportunity for cross-examination of witnesses or for him to call witnesses in his defence, the State party submits that in contempt of court proceedings, facts are usually placed before the court by affidavit, but either party may, move that the court order the attendance for cross-examination, of the person signing the affidavit. If cross-examination is granted, it will not be limited to the material in the affidavit, but may go to credibility or any issue relevant to the inquiry.

6.6 The State party reiterates that article 14, paragraph 5, does not require a factual retrial, and that the author had an opportunity to make both oral and written submissions in relation to his Special Leave application.

The author's further comments

7.1 In further letters dated 17 July and 30 November 2001, the author further comments on the State party's submission.

7.2 In respect of his claim under article 14, paragraph 5, of the Covenant, he refers to the Judiciary Act, section 35, which limits appeals to the High Court of Australia at subsection (2): "*An appeal shall not be brought from a judgement, whether final or interlocutory, referred to in subsection (1) unless the High Court gives Special Leave to Appeal.*" The criteria for granting Special Leave to Appeal listed in section 35A of the Act (see paragraph 4.20 above), demonstrate that the avenue of Special Leave to Appeal is not an appeal within the meaning of article 14, paragraph 5, of the Covenant. In this respect, the author refers to a transcript from a case before the High Court of Australia, in which a High Court judge states that the High Court is not a general Court of Appeal, that the judges do not sit to hear any case, and that there are only about 70 cases a year that the High Court can hear, and that these include the most important cases that affect the nation.

7.3 In respect of his claim under article 19, the author contends that by virtue of his conviction for contempt of court, his freedom of expression has been subjected to such restrictions that he can no longer write about public hearings in open court and refer to documents in the public domain, for fear of yet again being in contempt of court.

Issues and proceedings before the Committee

Consideration of admissibility

8.1 Before considering any claim contained in a communication, the Human Rights Committee must, in accordance with rule 87 of its rules of procedure, decide whether or not the communication is admissible under the Optional Protocol to the Covenant.

8.2 The Committee has ascertained that the same matter is not being examined under another procedure of international investigation or settlement for purposes of article 5, paragraph 2 (a), of the Optional Protocol.

8.3 In relation to the alleged violation of article 14, paragraph 1, of the Covenant, in that the author did not have a hearing by an impartial tribunal because one of the Supreme Court judges had previously, as partner of a law firm, conducted extensive defamation litigation against the author, that he was also a former partner of the law firm prosecuting the contempt charge against the author, and that the prosecutor was not required to act impartially or provide exculpatory evidence, the Committee notes that these issues were not raised by the defence in the Full Supreme Court of Western Australia, nor in the application for Special Leave to Appeal to the High Court. As to the author's contention that the Full Supreme Court does not review the decision of another Full Court, and that the issue of an impartial tribunal could not be raised in the Special Leave application, the Committee has noted the State party's submission to the contrary, and that the author has submitted no evidence to substantiate his allegation that these remedies were indeed unavailable to him. The Committee notes in particular that, according to the criteria laid down in the Judiciary Act, section 35A, invoked by the parties, the High Court of Australia may, when considering an application for Special Leave to Appeal, consider any matter that it deems relevant. The author has not demonstrated that the impartiality of the court could not be raised in an application for Special Leave to Appeal. Thus, the Committee considers that domestic remedies with respect to this matter have not been exhausted, and that this part of the communication is inadmissible under article 5, paragraph 2 (b), of the Optional Protocol.

8.4 With regard to the author's claim under article 14, paragraph 5, in that he could not have his conviction and sentence reviewed fully because the application for Special Leave to Appeal to the High Court, entailed only a limited review, the Committee considers that in fact the author in his Special Leave application raised only certain specific questions of law and did not seek a full review of the conviction by the Full Court of Western Australia. Consequently, the Committee considers that the author has not substantiated, for the purpose of admissibility, his claim that the limited review of his conviction and sentence allowed under his application for Special Leave to Appeal, in the circumstances of his case, amounted to a violation of his right under article 14, paragraph 5. This part of the communication is therefore, inadmissible under article 2 of the Optional Protocol.

8.5 With regard to the author's claim under article 19 of the Covenant, the Committee considers that the author has submitted sufficient arguments to substantiate for purposes of admissibility, that the fact that he was convicted and fined for publishing documents that had previously been referred to in open court, may raise issues under this article.

8.6 The Committee therefore decides that the communication is admissible insofar as it raises issues under article 19 of the Covenant.

Consideration of the merits

9.1 The Human Rights Committee has considered the present communication in the light of all the information made available to it by the parties, as provided in article 5, paragraph 1 of the Optional Protocol.

9.2 With regard to the author's claim under article 19, paragraph 2, that he was convicted and fined for publishing documents that had been referred to in an open court, the Committee recalls that article 19, paragraph 2, guarantees the right to freedom of expression and includes the "*freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media*". It considers that the author, by publishing documents that were referred to in an open court, by virtue of different media, was exercising his right to impart information within the meaning of article 19, paragraph 2.

9.3 The Committee observes that any restriction of the freedom of expression pursuant to paragraph 3 of article 19 must cumulatively meet the following conditions: it must be provided for by law, it must address one of the aims enumerated in paragraph 3 (a) and (b) of article 19, and must be necessary to achieve the legitimate purpose.

9.4 The Committee notes that the institution of contempt of court is an institution provided by law restricting freedom of expression for achieving the aim of protecting the right of confidentiality of a party to the litigation or the integrity of the court or public order. Here in the present case, though the five documents were directed to be discovered on the application of the author and CEPU, they were not allowed to be adduced in evidence with the result that they did not become part of the published record of the case. It may be noted that these five documents were not read aloud in court and their contents were not made known to anyone except the parties to the litigation and their lawyers. There was clearly, in the circumstances, a restriction on the publication of these five documents, implied from the refusal of the court to allow them to be adduced in evidence and not taking them as part of the public record of the case. This restriction was provided by the law of contempt of court and it was necessary for achieving the aim of protecting the rights of others, i.e. Hamersley, or for the protection of public order (*ordre public*). The Committee accordingly concludes that the author's conviction for contempt was a permissible restriction of his freedom of expression, in accordance with article 19, paragraph 3, and that there has been no violation of article 19, paragraph 2, of the Covenant.

10. The Human Rights Committee, acting under article 5, paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights, is of the view that the facts before it do not disclose a violation of any of the articles of the International Covenant on Civil and Political Rights.

[Adopted in English, French and Spanish, the English text being the original version. Subsequently to be issued also in Arabic, Chinese and Russian as part of the present report.]

Notes

[1] The Optional Protocol entered into force for Australia on 25 December 1991 on accession.

[2] See communication No. 387/1989, *Karttunen v. Finland,* Views adopted on 23 October 1992, and judgements of the European Court of Human Rights in case No. 8692/79, *Piersack v. Belgium*, adopted on 1 October 1982, case No. 9186/80, *De Cubber v. Belgium*, adopted on 26 October 1984, and case No. 10486/83, *Hauschildt v. Denmark*, adopted on 24 May 1989.

[3] See communication No. 593/1994, *Holland v. Ireland*, Views adopted on 25 October 1996, para. 9, 3, and communication No. 661/1995, *Triboulet v. France*, adopted on 29 July 1997, para. 6.2.

[4] See judgement of the European Court of Human Rights in cases Nos. 6878/75 and 7238/75, *Le Compte, Van Leuven and De Meyere v. Belgium*, adopted on 23 June 1981, para. 58.

[5] See communication No. 158/1983, decision adopted on 26 October 1984, para. 5.5.

[6] See judgement of the European Court of Human Rights in case No. 00019715/92, *N.W. v. Luxembourg*, adopted on 8 December 1992.

[7] See communication No. 536/1993, Views adopted on 28 March 1995.

[8] See communication No. 58/1979, Views adopted on 8 April 1981, para. 10.1.

[9] See communication No. 230/1987, *Henry v. Jamaica*, Views adopted on 1 November 1991.

[10] See communications Nos. 359/1989 and 385/1989, Views adopted on 31 March 1993, para. 11.4, and communication No. 518/1992, decision adopted on 18 March 1994, para. 10.4.

[11] See judgement of the European Court of Human Rights in case No. 6538/74, *The Sunday Times v. The United Kingdom*, adopted on 26 April 1979, para. 47.

APPENDIX

Individual opinion of Committee member Hipólito Solari Yrigoyen (dissenting)

My dissenting views on this communication are substantiated below:

8.4 With regard to the author's claim under article 14, paragraph 5, of the Covenant that he could not have his conviction and sentence reviewed because the High Court had not granted him Special Leave to Appeal, and because the application for Special Leave to Appeal does not amount to a full appeal, the Committee observes, first, that the State party does not dispute that the author has exhausted domestic remedies or that the remedies in respect of this claim have been exhausted. It further observes that the author has duly substantiated his application for Special Leave to Appeal and to obtain a full review of his conviction. The Committee considers, therefore, that the author has sufficiently substantiated, for the purposes of admissibility, his claim that the limited review of his conviction and sentence under the procedure of application for Special Leave to Appeal may raise issues under article 14, paragraph 5, of the Covenant. Thus, this part of the communication is admissible.

Consideration of the issue as to the merits (violation of article 14, paragraph 5)

9.2 With regard to the author's claim under article 14, paragraph 5, of the Covenant, the Committee notes the State party's argument that, to the extent that the Committee would assess the substantive correctness of the decision of the High Court, it would exceed its functions under the Optional Protocol. However, it is the Committee's duty to verify whether, under the procedure of an application for Special Leave to Appeal to the High Court, the author was afforded the possibility to have his conviction and sentence reviewed in accordance with article 14, paragraph 5, of the Covenant.

9.3 The Committee observes that, in accordance with the Judiciary Act, section 35A, the grounds on which the High Court may hear any matters that it considers relevant shall have regard to questions of law, public importance, differences of opinion between courts as to the state of law, or whether the interests of the administration of justice require consideration by the High Court of the judgement to which the application relates. The State party has also referred to the jurisprudence of the former European Commission of Human Rights, which held that it is sufficient to restrict the right of appeal to questions of law and affirms that, while leave to appeal to the High Court is not limited to questions of law, the fact that issues of this kind are not raised in an appeal is a factor that may lead the Court to reject an appeal. Furthermore, the State party indicates that the requirement for Special Leave to Appeal was instituted in 1984, due to the unmanageable volume of work facing the High Court and to the fact that appeals often involved issues of fact with which it was inappropriate to burden the highest appellate court.

The Committee recalls its jurisprudence in *Lumley v. Jamaica* and *Rogerson v. Australia* that, while on the basis of article 14, paragraph 5, every convicted person has the right to have his conviction and sentence reviewed by a higher tribunal according to law, a legal system that does not allow for an automatic right to appeal may still be in conformity with article 14, paragraph 5, as long as the examination of an application for leave to appeal entails a full review, that is, both on the basis of the evidence and of the law, of conviction and sentence, and as long

as the procedure allows for due consideration of the nature of the case. Thus, the question before the Committee in the case under consideration is whether the Special Leave for Appeal procedure before the High Court of Australia allows for such a full review of the conviction and sentence.

9.4 Relevant for such an evaluation are the criteria laid down in the Judiciary Act, section 35A, invoked by both parties and mentioned in the preceding paragraph. The transcript of the author's hearing indicates that the Special Leave hearing does not amount to a review of the merits of the particular case and that the High Court of Australia has not evaluated the evidence presented at trial and in the development of the case.

9.5 The High Court itself has delineated the limits of its competence, for example, in the decision of the High Court submitted by the author, in which a judge states that "*the High Court is not a general Court of Appeal, that the judges do not sit to hear any case, and that there are only about 70 cases a year that the High Court can hear and they include the most important cases that affect the nation*". Furthermore, the High Court's grounds for dismissing the author's duly substantiated application for Special Leave to Appeal demonstrate that the Court only considered whether there was sufficient reason to doubt the correctness of the decision of the Full Supreme Court, and whether the case was a suitable vehicle for determining the question of principle advanced by the applicants because it appeared unlikely that a decision of an appeal would require a determination of that issue. The Committee finds that these grounds for dismissal do not reflect a full review of the evidence and law, nor due consideration of the nature of the author's case, in terms of article 14, paragraph 5, which confers the unrestricted right to have conviction and sentence reviewed by a higher court.

(*Signed*): Hipólito Solari Yrigoyen
29 March 2004

[Adopted in English, French and Spanish, the Spanish text being the original version. Subsequently to be issued also in Arabic, Chinese and Russian as part of the present report.]

P. Communication No. 926/2000, *Shin v. Republic of Korea* (Views adopted on 16 March 2004, eightieth session)*

Submitted by:	Hak-Chul Shin (represented by counsel, Mr.Yong-Whan Cho)
Alleged victim:	The author
State party:	Republic of Korea
Date of communication:	25 April 2000 (initial submission)

The Human Rights Committee, established under article 28 of the International Covenant on Civil and Political Rights,

Meeting on 16 March 2004,

Having concluded its consideration of communication No. 926/2000, submitted to the Human Rights Committee on behalf of Mr. Hak-Chul Shin under the Optional Protocol to the International Covenant on Civil and Political Rights,

Having taken into account all written information made available to it by the authors of the communication, and the State party,

Adopts the following:

Views under article 5, paragraph 4, of the Optional Protocol

1.1 The author of the communication is Hak-Chul Shin, a national of the Republic of Korea born on 12 December 1943. He claims to be a victim of a violation by the Republic of Korea of article 19, paragraph 2, of the Covenant. He is represented by counsel.

1.2 On 8 May 2000, the Committee, acting through its Special Rapporteur on new communications, pursuant to rule 86 of the Committee's rules of procedure, requested the State party not to destroy the painting for the production of which the author was convicted, whilst the case was under consideration by the Committee.

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* The following members of the Committee participated in the examination of the present communication: Mr. Abdelfattah Amor, Mr. Nisuke Ando, Mr. Prafullachandra Natwarlal Bhagwati, Ms. Christine Chanet, Mr. Maurice Glèlè Ahanhanzo, Mr. Walter Kälin, Mr. Ahmed Tawfik Khalil, Mr. Rafael Rivas Posada, Sir Nigel Rodley, Mr. Martin Scheinin, Mr. Ivan Shearer, Mr. Hipólito Solari Yrigoyen, Ms. Ruth Wedgwood, Mr. Roman Wieruszewski and Mr. Maxwell Yalden.

The facts as presented by the author

2.1 Between July 1986 and 10 August 1987, the author, a professional artist, painted a canvas-mounted picture sized 130 cm by 160 cm. The painting, entitled "Rice Planting (Monaeki)" was subsequently described by the Supreme Court in the following terms:

> "The painting as a whole portrays the Korean peninsula in that its upper right part sketches Baek-Doo-San, while its lower part portrays the southern sea with waves. It is divided into lower and upper parts each of which portrays a different scene. The lower part of the painting describes a rice-planting farmer ploughing a field using a bull which tramps down on E. T. [the movie character 'Extraterrestial'], symbolizing foreign power such as the so-called American and Japanese imperialism, Rambo, imported tobacco, Coca Cola, Mad Hunter, Japanese samurai, Japanese singing and dancing girls, the then [United States'] President Ronald Reagan, the then [Japanese] Prime Minister Nakasone, the then President [of the Republic of Korea] Doo Hwan Chun who symbolizes a fascist military power, tanks and nuclear weapons which symbolize the U.S. armed forces, as well as men symbolizing the landed class and comprador capitalist class. The farmer, while ploughing a field, sweeps them out into the southern sea and brings up wire-entanglements of the 38th parallel. The upper part of the painting portrays a peach in a forest of leafy trees in the upper left part of which two pigeons roost affectionately. In the lower right part of the forest is drawn Bak-Doo-San, reputed to be the Sacred Mountain of Rebellion [located in the Democratic People's Republic of Korea (DPRK)], on the left lower part of which flowers are in full blossom and a straw-roofed house as well as a lake is portrayed. Right below the house are shown farmers setting up a feast in celebration of fully-ripened grains and a fruitful year and either sitting around a table or dancing, and children with an insect net leaping about."

The author states that as soon as the picture was completed, it was distributed in various forms and was widely publicized.

2.2 On 17 August 1989, the author was arrested on a warrant by the Security Command of the National Police Agency. The painting was seized and allegedly damaged by careless handling of the prosecutor's office. On 29 September 1989, he was indicted for alleged breach of article 7 of the National Security Law, in that the picture constituted an "enemy-benefiting expression".[1] On 12 November 1992, a single judge of the Seoul Criminal District Court, at first instance, acquitted the author. On 16 November 1994, three justices of the 5th panel of the Seoul District Criminal Court dismissed the prosecutor's appeal against acquittal, considering article 7 of the National Security Law applicable only to acts which were "clearly dangerous enough to engender national existence/security or imperil the free democratic basic order". On 13 March 1998, however, the Supreme Court upheld the prosecutor's further appeal, holding that the lower court had erred in its finding that the picture was not an "enemy-benefiting expression", contrary to article 7 of the National Security Law. In the Court's view, that provision is breached "when the expression in question is actively and aggressively threatening the security and country or the free and democratic order". The case was then remitted for retrial before three justices of the Seoul District Criminal Court.

2.3 During the retrial, the author moved that the Court refer to the Constitutional Court the question of the constitutionality of the Supreme Court's allegedly broad construction of article 7 of the National Security Law in the light of the Constitutional Court's previous confirmation of the constitutionality of an allegedly narrower construction of this article. On 29 April 1999, the Constitutional Court dismissed a third party's constitutional application raising the identical issue on the basis that, having previously found the provision in question to be constitutional, it was within the remit of the Supreme Court to define the scope of the provision. As a result, the Seoul District Criminal Court dismissed the motion for a constitutional reference.

2.4 On 13 August 1999, the author was convicted and sentenced to probation, with the court ordering confiscation of the picture. On 26 November 1999, the Supreme Court dismissed the author's appeal against conviction, holding simply that "the lower court decision [convicting the author] was reasonable because it followed the previous ruling of the Supreme Court overturning the lower court's original decision". With the conclusion of proceedings against the author, the painting was thus ready for destruction following its earlier seizure.

The complaint

3.1 The author contends that his conviction and the damage caused to the picture by mishandling are in violation of his right to freedom of expression protected under article 19, paragraph 2, of the Covenant. At the outset, he contends that the painting depicts his dream of peaceful unification and democratization of his country based on his experience of rural life during childhood. He argues that the prosecution's argument, in depicting the painting as the author's opposition to a corrupt militaristic south and the desirability of a structural change towards peaceful, traditionally-based farming north, and thus an incitement to "communisation" of the Republic of Korea, is beyond any logical understanding.

3.2 The author further argues that the National Security Law, under which he was convicted, is directly aimed at restricting "people's voices". He recalls in this vein the Committee's Concluding Observations on the State party's initial and second periodic reports under article 40 of the Covenant,[2] its Views in individual communications under the Optional Protocol[3] as well as recommendations of the Special Rapporteur of the Commission on Human Rights on the right to freedom of opinion and expression.[4]

3.3 The author notes that, at trial, the prosecution produced an "expert witness", whose opinion was regarded as authoritative by the Supreme Court, in support of the charges. This expert contended that the picture followed the theory of "socialist realism". In his view, it depicted a "class struggle", led by farmers seeking to overthrow the Republic of Korea due to its relationship with the United States and Japan. The expert considered that the mountains shown in the picture represented the "revolution" led by the DPRK, and that the shape of houses depicted reflected those of the birthplace of former DPRK leader Kim Il Sung. Thus, in the expert's opinion, the author sought to incite overthrow of the regime of the Republic of Korea and its substitution with "happy lives" lived according to DPRK doctrine.

3.4 While the lower courts regarded the picture as, in the author's words, "nothing more than a description of the imagery situation in [his] aspirations for unification in line with his personal idea of Utopia", the Supreme Court adopted the expert's view, without explaining its rejection of the lower court's view and of their assessment of the expert evidence. On retrial, the same expert again gave evidence, contending that even though the picture was not drawn in accordance with "socialist realism", it depicted happiness in the DPRK, which would please persons in the DPRK whenever they saw it, and that thus the picture fell within the purview of the National Security Law. Under cross-examination, it emerged that the expert was a former

DPRK spy and former painting teacher without any further professional expertise in art, who was employed by the Institute for Strategic Research against Communism of the National Police Agency, whose task was to assist police investigation of national security cases.

3.5 According to the author, during the retrial, his counsel pointed out that in 1994, during the author's original trial, a copy of the picture was displayed in the National Gallery of Modern Art in an exhibition entitled "15 Years of People's Art", an artistic style positively commented upon by the Gallery. Counsel also led in expert evidence an internationally known art critic, who rejected the prosecution expert's contentions. In addition, counsel, in arguing for a narrow interpretation of article 7 of the National Security Law, provided the court with the Committee's previous Views and Concluding Observations, as well as the Special Rapporteur's recommendations, all of which are critical of the National Security Law. Notwithstanding, the Court concluded that his conviction was "necessary" and justified under the National Security Law.

3.6 The author argues that the Court failed to demonstrate that his conviction was necessary for purposes of national security, as required under article 19, paragraph 2, to justify an infringement of the right to freedom of expression. The Court applied a subjective and emotional test, finding the picture "active and aggressive" in place of the objective standard previously articulated by the Constitutional Court. Without showing any link of the author to the DPRK or any other implication of national security, the Supreme Court justices simply expressed personal feelings as to the effect of the picture upon viewing it. This demarche effectively places the burden of proof on the defendant, to prove himself innocent of the charges.

3.7 By way of remedy, the author seeks (i) a declaration that his conviction and the damage caused to the painting by careless handling violated his right to freedom of expression, (ii) unconditional and immediate return of the painting in its present condition, (iii) a guarantee by the State party of non-violation in the future by repeal or suspension of article 7 of the National Security Law, (iv) reopening his conviction by a competent court, (v) payment of adequate compensation, (vi) publication of the Committee's Views in the Official Gazette and their transmission to the Supreme Court for distribution to the judiciary.

3.8 The author states that the same matter has not been submitted for examination under any other procedure of international investigation or settlement.

The State party's submissions on admissibility and merits

4.1 By note verbale of 21 December 2001, the State party argued that the communication is inadmissible and lacking in merit. As to admissibility, the State party argues that as the judicial proceedings in the author's case were consistent with the Covenant, the case is inadmissible.

4.2 Concerning the merits of the case, the State party contends that the right to freedom of expression is fully guaranteed as long as any expression does not infringe the law, and that article 19 of the Covenant itself provides for certain restrictions on its exercise. As the painting was lawfully confiscated, there is no ground for either retrial or compensation. In addition, retrial is not provided for in national law and any amendment to law to so provide is not feasible. Any claims of a violation of the right to freedom of expression will be considered on the merits in individual cases. As a result, the State party cannot commit itself to a suspension or repeal of article 7 of the National Security Law, although a revision is under discussion.

The author's comments

5.1 Following reminders of 10 October 2002 and 23 May 2003, the author indicated, by communication of 3 August 2003, that as the State party had not provided any substantive reasoning in terms of article 19 of the Covenant to justify his conviction, he did not wish to comment further on the State party's arguments.

Issues and proceedings before the Committee

Consideration of admissibility

6.1 Before considering any claim contained in a communication, the Human Rights Committee must, in accordance with rule 87 of its rules of procedure, decide whether or not the complaint is admissible under the Optional Protocol to the Covenant.

6.2 The Committee has ascertained that the same matter is not being examined under another procedure of international investigation or settlement for the purposes of article 5, paragraph 2 (a) of the Optional Protocol. With respect to the exhaustion of domestic remedies, the Committee notes that the State party has not claimed that there are any domestic remedies that have not been exhausted or could be further pursued by the author. Since the State party is claiming inadmissibility on the generic contention that the judicial proceedings were consistent with the Covenant, issues which are to be considered at the merits stage of the communication, the Committee considers it more appropriate to consider the State party's arguments in this respect at that stage.

Consideration of the merits

7.1 The Human Rights Committee has considered the present communication in the light of all the information made available to it by the parties, as provided in article 5, paragraph 1, of the Optional Protocol.

7.2 The Committee observes that the picture painted by the author plainly falls within the scope of the right of freedom of expression protected by article 19, paragraph 2; it recalls that this provision specifically refers to ideas imparted "in the form of art". Even if the infringement of the author's right to freedom of expression, through confiscation of his painting and his conviction for a criminal offence, was in the application of the law, the Committee observes that the State party must demonstrate the necessity of these measures for one of the purposes enumerated in article 19 (3). As a consequence, any restriction on that right must be justified in terms of article 19 (3), i.e. besides being provided by law it also must be necessary for respect of the right or reputations of others, or for the protection of national security or public order (*ordre public*) or of public health and morals ("the enumerated purposes").

7.3 The Committee notes that the State party's submissions do not seek to identify which of these purposes are applicable, much less the necessity thereof in the particular case; it may however be noted that the State party's superior courts identified a national security basis as justification for confiscation of the painting and the conviction of the author. As the Committee has consistently found, however, the State party must demonstrate in specific fashion the precise nature of the threat to any of the enumerated purposes caused by the author's conduct, as well as why seizure of the painting and the author's conviction were necessary. In the absence of such justification, a violation of article 19, paragraph 2, will be made out.[5] In the absence of any individualized justification therefore of why the measures taken were necessary in the present case for an enumerated purpose, therefore, the Committee finds a violation of the author's right to freedom of expression through the painting's confiscation and the author's conviction.

8. The Human Rights Committee, acting under article 5, paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights, is of the view that the facts before it disclose a violation of article 19, paragraph 2, of the Covenant.

9. In accordance with article 2, paragraph 3 (a), of the Covenant, the State party is under an obligation to provide the author with an effective remedy, including compensation for his conviction, annulment of his conviction, and legal costs. In addition, as the State party has not shown that any infringement on the author's freedom of expression, as expressed through the painting, is justified, it should return the painting to him in its original condition, bearing any necessary expenses incurred thereby. The State party is under an obligation to avoid similar violations in the future.

10. Bearing in mind that, by becoming a State party to the Optional Protocol, the State party has recognized the competence of the Committee to determine whether there has been a violation of the Covenant or not and that, pursuant to article 2 of the Covenant, the State party has undertaken to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the Covenant, the Committee wishes to receive from the State party, within 90 days, information about the measures taken to give effect to its Views. The State party is also requested to publish the Committee's Views.

[Adopted in English, French and Spanish, the English text being the original version. Subsequently to be issued also in Arabic, Chinese and Russian as part of the present report.]

Notes

[1] Article 7 of the National Security Law provides, inter alia,

> "Any person who has benefited the anti-State organization by way of praising, encouraging or siding with or through other means the activities of an anti-State organization, its member or a person who had been under instruction from such organization, shall be punished by imprisonment for not more than seven years.
>
> … Any person who has, for the purpose of committing the actions stipulated in paragraphs 1 through 4 of this article, produced, imported, duplicated, processed, transported, disseminated, sold or acquired documents, drawings or any other similar means of expression shall be punished by the same penalty as set forth in each paragraph." [author's translation]

[2] A/47/40, paras. 470-528 (initial report), and CCPR/C/79/Add.114, 1 November 1999 (second periodic report).

[3] *Tae Hoon Park v. Republic of Korea* case No. 628/1995, Views adopted 20 October 1998, and *Keun-Tae Kim v. Republic of Korea* case No. 574/1994, Views adopted 3 November 1998.

[4] E/CN.4/1996/39/Add.1.

[5] See, for example, *Tae Hoon Park v. Republic of Korea* case No. 628/1995, Views adopted 20 October 1998, at para. 10.3, and *Keun-Tae Kim v. Republic of Korea* case No. 574/1994, Views adopted 3 November 1998, at paras. 12.4-12.5.

Q. Communication No. 927/2000, *Svetik v. Belarus*
(Views adopted on 8 July 2004, eighty-first session)*

Submitted by:	Mr. Leonid Svetik
Alleged victim:	The author
State party:	Belarus
Date of communication:	5 November 1999 (initial submission)

The Human Rights Committee, established under article 28 of the International Covenant on Civil and Political Rights,

Meeting on 8 July 2004,

Having concluded its consideration of communication No. 927/2000, submitted to the Human Rights Committee by Mr. Leonid Svetik under the Optional Protocol to the International Covenant on Civil and Political Rights,

Having taken into account all written information made available to it by the author of the communication and the State party,

Adopts the following:

Views under article 5, paragraph 4, of the Optional Protocol

1.1 The author of the communication is Mr. Leonid Svetik, a Belarusian national born in 1965. He claims to be a victim of violations by Belarus of his rights under articles 14, paragraph 3 (g), and 19, of the Covenant. The author is not represented by counsel.

1.2 The Optional Protocol entered into force for the State party on 30 December 1992.

The facts as submitted by the author

2.1 The author - a teacher in a high school - is a representative of the NGO - Belarusian Helsinki Committee (BHC) in the city of Krichev (Belarus). On 24 March 1999, the national newspaper *Narodnaya Volya* (People's Will) published a declaration, criticizing the policy of the authorities in power. The declaration was written and signed by representatives of hundreds of Belarusian regional political and non-governmental organizations (NGOs), including the author. The latter observes that the declaration contained an appeal not to take part in the forthcoming local elections as a protest against the electoral law which the signatories believed was incompatible with "the Belarusian Constitution and the international norms".

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* The following members of the Committee participated in the examination of the present communication: Mr. Abdelfattah Amor, Mr. Prafullachandra Natwarlal Bhagwati, Mr. Franco Depasquale, Mr. Maurice Glèlè Ahanhanzo, Mr. Walter Kälin, Mr. Ahmed Tawfik Khalil, Mr. Rafael Rivas Posada, Sir Nigel Rodley, Mr. Martin Scheinin, Mr. Ivan Shearer, Mr. Hipólito Solari Yrigoyen, Ms. Ruth Wedgwood and Mr. Roman Wieruszewski.

The text on an individual opinion signed by Committee member Sir Nigel Rodley is appended to the present document.

2.2 On 12 April 1999, the author was called to the Krichev Prosecution Office to explain his signature on the above-mentioned open letter. He states that only two of the four NGOs in Krichev who also signed the appeal were called to the Prosecutor's Office, since they were considered as belonging to the political opposition.

2.3 On 26 April 1999, the author was summoned to appear before the Krichev District Court. The judge informed him that his signature on the open letter amounted to an offence under article 167, part 3,[1] of the Belarusian Code on Administrative Offences (CAO) and ordered him to pay a fine of 1 million Belarusian rubles, the equivalent of two minimum salaries.[2] According to the author, the judge was not impartial and threatened to sentence him to the maximum penalty - 10 minimum monthly salaries, as well as to report him to his employer if he did not confess his guilt.

2.4 The author appealed the decision to the Mogilev Regional Court, arguing that it was illegal and unfair, as the finding of his guilt was based on his confession, which was obtained under duress. On 2 June 1999, the President of the Regional Court dismissed his appeal, stating that his offence was confirmed and had not been contested by him in court. He added that guilt was also proven by his explanations and by his signature on the article in the *Narodnaya Volya* newspaper. The author's argument relating to the use of pressure by the District Court judge was found groundless, as it was not corroborated by any other element in the file. The Krichev District Court's ruling was therefore affirmed.

2.5 The author complained to the Supreme Court. On 24 December 1999, the First Deputy President of the Supreme Court dismissed the appeal. He held that the claim was unsubstantiated, that the offence was proven, and that the author's action was correctly qualified as constituting an offence within the meaning of article 167-3 of the CAO.

The claim

3. The author claims to be a victim of violations of his rights under articles 14, paragraph 3 (g), and 19, of the Covenant.

The State party's observations on admissibility and merits

4.1 By note verbale of 9 November 2000, the State party explains that at the time of the author's sentence, the then applicable legislation provided an administrative sanction for public appeals calling for the boycott of elections (art. 167-3, CAO). The impugned newspaper article of 24 March 1999 contained such an appeal; this was not contested by the author in court. According to the State party, the legislation was fully in conformity with article 19, paragraph 3, of the Covenant, which stipulates that the exercise of the rights protected by article 19, paragraph 2, of the Covenant is subject to limitations, which must be provided by law.

4.2 According to the State party, the author's allegations about psychological pressure exercised by the District Court judge was not confirmed after inquiries undertaken by the competent State authorities.

4.3 The State party adds that, contrary to the previously applicable electoral legislation, article 49 of the Belarusian Electoral Code[3] of April 2000 does not contain a direct clause governing the responsibility of individuals who call for the boycott of elections and appropriate modifications were introduced to the CAO. The State party further notes that article 38 of the CAO provides that if an individual, who was subject to an administrative penalty, had not committed any new administrative offence within one year after purging the previous penalty, he is considered as not having been subjected to the administrative penalty. For the State party, there is no ground to annul the Court decision of 26 April 1999 with regard to Mr. Svetik, as he is considered a person who had not been subjected to administrative penalty. Accordingly, the administrative penalty imposed on Mr. Svetik in 1999 had no negative consequences for him.

The author's comments on the State party's observations

5.1 By letter of 3 January 2001, the author concedes that the then applicable Belarusian law prescribed administrative punishment for public appeals to boycott elections. However, according to him, the appeal of 24 March 1999 in the *Narodnaya Volya* newspaper was a call not to participate in undemocratic local elections, not a call to boycott the elections in general. For this reason and pursuant to articles 19, paragraph 2, of the Covenant and 33 of the Belarusian Constitution,[4] the author signed the appeal. According to him, all the signatories of the letter considered that every elector had the right not to take part in a vote if he/she considered that the elections were held in violation of democratic procedures.

5.2 As to the State party's inquiry about his claim of psychological duress exerted by the District Court judge, the author states that he was unaware of such an inquiry. He submits a signed statement by a co-accused in the trial, Mr. Andreï Kuzmin; the latter confirms that the author was subjected to pressure by the judge.[5]

5.3 Finally, on the State party's observation on the lack of direct consequences of the sentence, the author argues that the payment of the fine has negative impact on his material situation, that the use of psychological duress by the District Court judge humiliated his human dignity and caused him moral suffering. The author points out that as a complementary punishment, the court's decision was sent to his employer, which could have resulted in his dismissal.

Consideration of admissibility

6.1 Before considering any claim contained in a communication, the Human Rights Committee must, in accordance with rule 87 of its rules of procedure, decide whether or not the communication is admissible under the Optional Protocol to the Covenant.

6.2 The Committee notes that the same matter is not being examined under any other international procedure and that available domestic remedies have been exhausted. The conditions set forth in paragraphs 2 (a) and (b) of article 5 of the Optional Protocol are therefore satisfied.

6.3 The Committee has noted the author's claim under article 14, paragraph 3 (g), of the Covenant, relating to the alleged psychological pressure by the District Court judge to have him confess. The Committee notes the State party's explanation that its competent authorities proceeded to a verification which concluded that the judge exercised no pressure. The author contends that he was unaware of this verification, and provides a written statement of a co-accused affirming that the author was threatened by the District Court judge to confess guilt. However, the Committee notes from the submissions before it that, when examining the author's appeal arguments, the regional court concluded that the author's guilt was proven not only on the basis of his confession in court, but also on the basis of his deposition made to the prosecution, and since his name and title appeared in the newspaper's article.

Consequently, the Committee notes that the author's allegation relates primarily to an evaluation of facts and evidence in the case. It recalls that it is generally for the courts of States parties to the Covenant to review facts and evidence in a particular case, unless it can be shown that the evaluation of evidence was clearly arbitrary or amounted to a denial of justice, or that the court otherwise violated its obligation of independence and impartiality. The information before the Committee does not provide substantiation for a conclusion that decisions of the district and regional courts suffered from such defects. Accordingly, this part of the communication is inadmissible pursuant to article 2 of the Optional Protocol.

6.4 As far as the author's allegation under article 19, paragraph 2 of the Covenant is concerned, the Committee takes note of the State party's argument that appropriate changes to the electoral law have been made and that the administrative penalty imposed upon the author entail to no consequences. However, the State party has not refuted the author's contention that he had to pay the fine in question. Accordingly, neither subsequent modifications to the law nor absence of any legal continuing consequences of the sanction imposed on him deprive him of the status of "victim" in the present case. The Committee considers that this part of the communication has been sufficiently substantiated for purposes of admissibility and decides to proceed to its examination on the merits.

Consideration of the merits

7.1 The Human Rights Committee has considered the present communication in the light of all the information made available to it by the parties, as provided in article 5, paragraph 1 of the Optional Protocol.

7.2 The author claims that his right under article 19 has been violated, as he was subjected to an administrative penalty for the sole expression of his political opinion. The State party only objects that the author was sentenced in compliance with the applicable law, and that, pursuant to paragraph 3 of article 19, the rights protected by paragraph 2 are subject to limitations. The Committee recalls that article 19 allows restrictions only to the extent that they are provided by law and only if they are necessary (a) for respect of the rights and reputation of others; and (b) for the protection of national security or public order (*ordre public*), or of public health or morals.[6] The Committee thus has to decide whether or not punishing a call to boycott a particular election is a permissible limitation of the freedom of expression.

7.3 The Committee recalls that according to article 25 (b), every citizen has the right to vote. In order to protect this right, States parties to the Covenant should prohibit intimidation or coercion of voters by penal laws and those laws should be strictly enforced.[7] The application of such laws constitutes, in principle, a lawful limitation of the freedom of expression, necessary for respect of the rights of others. However, intimidation and coercion must be distinguished from encouraging voters to boycott an election. The Committee notes that voting was not compulsory in the State party concerned and that the declaration signed by the author did not affect the possibility of voters to freely decide whether or nor to participate in the particular election. The Committee concludes that in the circumstances of the present case the limitation of the liberty of expression did not legitimately serve one of the reasons enumerated in article 19, paragraph 3, of the Covenant and that the author's rights under article 19, paragraph 2, of the Covenant have been violated.

8. The Human Rights Committee, acting under article 5, paragraph 4, of the Optional Protocol, is of the view that the facts before it disclose a violation of article 19, paragraph 2, of the International Covenant on Civil and Political Rights.

9. In accordance with article 2, paragraph 3 (a), of the Covenant, the State party is under an obligation to provide the author with an effective remedy, including compensation amounting to a sum not less than the present value of the fine and any legal costs paid by the author.[8] The State party is also under an obligation to prevent similar violations in the future.

10. Bearing in mind that, by becoming a party to the Optional Protocol, the State party has recognized the competence of the Committee to determine whether there has been a violation of the Covenant or not and that, pursuant to article 2 of the Covenant, the State party has undertaken to ensure to all individuals within its territory or subject to its jurisdiction the rights recognized in the Covenant and to provide an effective and enforceable remedy in case a violation has been established, the Committee wishes to receive from the State party, within 90 days, information about the measures taken to give effect to the Committee's Views. The State party is also requested to publish the Committee's Views.

[Adopted in English, French and Spanish, the English text being the original version. Subsequently to be issued also in Arabic, Chinese and Russian as part of the present report.]

Notes

[1] Article 167-3, CAO. (Violation of electoral legislation). *Article 167-3 was introduced by the Law of 5 December 1989 - Collection of Laws BSSR, 1989, No. 35, art. 386; edition of the Law of 30 March 1994 - of the Supreme Court of Belarus, 1994, No. 14, p. 190.*

[2] A copy of the decision has been provided by the author. The Court concluded that on 24 March 1999, "representatives of regional political and non-governmental organizations published a statement in the *Narodnaya Volya* newspaper, which contained public appeals to boycott the forthcoming local elections for counsels of deputies. The representative of the Krichev Section of the Belarusian Helsinki Committee, L.V. Svetik, agreed with the text of the appeal and put his signature on it".

[3] Article 49, Belarusian Electoral Code: *Responsibility for Violation of Requirements of the Present Code.*

[4] Article 33 of the Constitution stipulates: "Everyone is guaranteed freedom of thoughts and beliefs and their free expression. No one shall be forced to express one's beliefs or to deny them. No monopolization of the mass media by the State, public associations or individual citizens and no censorship shall be permitted."

[5] By letter of 25 December 2000, Mr. Kuzmin confirms that on 26 April 1999, the judge had exerted psychological pressure on Mr. Svetik during the trial.

[6] See, inter alia, communication No. 574/1994, *Kim v. Republic of Korea*, Views dated 3 November 1998; communication No. 628/1995, *Park v. Republic of Korea*, Views dated 20 October 1998; communication No. 780/1997, *Laptsevich v. Belarus*, Views dated 13 April 2000.

[7] General comment No. 25 (1996), para. 11.

[8] For the proposed remedy, see communication No. 780/1997, *Laptsevich v. Belarus*, Views dated 13 April 2000.

APPENDIX

Individual opinion of Committee member Sir Nigel Rodley (concurring)

In its consideration of the merits, the Committee "notes that voting was not compulsory in the State party concerned" (paragraph 7.3). The Committee does not spell out the relevance of this observation. It is to be hoped that it is not wittingly or unwittingly indicating that a system of compulsory voting would of itself justify the enforcement of a law that would make advocacy of electoral boycott an offence. Much will depend on the context within which a particular system is established. In a jurisdiction in which there may be forces seeking, not to persuade, but to intimidate voters not to vote, legal compulsion to vote may be an appropriate means to protect voters who wish to vote but are afraid of being seen to disobey the pressures not to vote.

Conversely, history is replete with honourable reasons for opposing regular participation in an electoral process that is believed to be illegitimate. The most blatant example is a vote collection and counting system that is or is expected to be fraudulently manipulated (vote rigging). Another example would be when the voter is offered no choice. A more equivocal example would be when there may be a choice but it is argued that it is not a real choice.

There is no comfortable way in which a body such as the Committee could or should begin credibly to make judgements on matters like these. It will never be in a position itself to pronounce on the legitimacy of advocating this, that or the other form of non-cooperation with a particular electoral exercise in a given jurisdiction. It follows that in any system it must always be possible for a person to advocate non-cooperation with an electoral exercise whose legitimacy that person may wish to challenge. There may be room for flexibility in the means of non-cooperation that may be advocated, be it electoral boycott, the spoiling of ballots, the writing in of alternatives and so on. But, it would be inconsistent with article 19 to prevent the advocacy of any means of non-cooperation as a challenge to the process itself. Indeed, it may similarly be incompatible with the right contained in article 25 to deny to the individual voter, on pain of legally prescribed disadvantage, any possibility whatsoever of manifesting his or her non-cooperation with the process.

(*Signed*): Sir Nigel Rodley

[Adopted in English, French and Spanish, the English text being the original version. Subsequently to be issued also in Arabic, Chinese and Russian as part of the present report.]

R. Communication No. 938/2000, *Girjadat Siewpersaud et al. v. Trinidad and Tobago* (Views adopted on 29 July 2004, eighty-first session)*

Submitted by:	Messrs. Girjadat Siewpersaud, Deolal Sukhram, and Jainarine Persaud (represented by counsel, Mr. Parvais Jabbar of the law firm Simons Muirhead & Burton)
Alleged victim:	The authors
State party:	Trinidad and Tobago
Date of initial communication:	25 July 1998 (initial submission)

The Human Rights Committee, established under article 28 of the International Covenant on Civil and Political Rights,

Meeting on 29 July 2004,

Having concluded its consideration of communication No. 938/2000, submitted to the Human Rights Committee on behalf of Messrs. Girjadat Siewpersaud, Deolal Sukhram, and Jainarine Persaud, under the Optional Protocol to the International Covenant on Civil and Political Rights,

Having taken into account all written information made available to it by the author of the communication, and the State party,

Adopts the following:

Views under article 5, paragraph 4, of the Optional Protocol

1. The authors of the communication are Messrs. Girjadat Siewpersaud, Deolal Sukhram, and Jainarine Persaud, Guyanese citizens, currently detained at State Prison in Port of Spain in the Republic of Trinidad and Tobago. They claim to be victims of violations by Trinidad and Tobago[1] of articles 2, paragraph 3, 7, 9, paragraph 3, 10, paragraph 1, and 14, paragraph 1, of the International Covenant on Civil and Political Rights. They are represented by counsel.

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* The following members of the Committee participated in the examination of the present communication: Mr. Abdelfattah Amor, Mr. Nisuke Ando, Mr. Prafullachandra Natwarlal Bhagwati, Ms. Christine Chanet, Mr. Franco Depasquale, Mr. Maurice Glèlè Ahanhanzo, Mr. Walter Kälin, Mr. Ahmed Tawfik Khalil, Mr. Rafael Rivas Posada, Sir Nigel Rodley, Mr. Martin Scheinin, Mr. Ivan Shearer, Mr. Hipólito Solari Yrigoyen, Ms. Ruth Wedgwood, Mr. Roman Wieruszewski and Mr. Maxwell Yalden.

The facts as submitted by the authors

2.1 On 19 January 1988, the High Court of Justice of Port of Spain convicted of murder and sentenced to death, Girjadat Siewpersaud, Deolal Sukhram and Jainarine Persaud. They applied for leave to appeal to the Court of Appeal. On 29 March 1993, the Court of Appeal rejected their applications. They thereupon petitioned the Judicial Committee of the Privy Council for Special Leave to Appeal. Their petition was dismissed on 27 April 1995. On 4 January 1994, the authors' death sentences were commuted to life imprisonment.

2.2 The authors were convicted of a murder said to have been committed between March and April 1985. The trial commenced in January 1988, approximately 34 months after arrest. The authors state that, throughout this time, they were detained in appalling conditions. From their conviction on 19 January 1988 to the commutation of their death sentences to life imprisonment on 4 January 1994, i.e. for six years they were confined to the death row section of State Prison in Port of Spain.

2.3 The authors contend that for the above period of time, they were held in solitary confinement in a cell measuring 9 by 6 feet containing a bench, a bed, a mattress and a table. In the absence of sanitation facilities in the cell, a plastic pail was provided as a toilet. Deolal Sukhram's cell was in front of the prison officers' toilet and bath which meant that his cell was usually cold and damp, due to water leaking from the bath. A ventilation hole measuring 36 by 24 inches, provided scarce and inadequate ventilation and light to the authors' cells. The only other light provided was by a fluorescent neon light lit for 23 hours a day located outside the cell above the door. The lack of adequate light damaged Deolal Sukhram's eyesight necessitating the use of glasses. The authors were allowed out of their cells for exercise only one hour per week.

2.4 Since the commutation of their death sentences, the authors have been detained at the State Prison in similarly degrading conditions. Each author is detained in a cell together with 8 to 14 other prisoners. The cell measures 9 by 6 feet and contains one iron bed with no mattress. As a result, prisoners are forced to sleep on the concrete floor on pieces of cardboard. Cells are infested with cockroaches, rats and flies and are generally dirty. There is inadequate ventilation and the cells heat up, making it impossible to sleep. The crowded conditions and the poor ventilation result in a general lack of oxygen in the cells, causing Deolal Sukhram to feel drowsy and suffer from continuous headaches.

2.5 In the absence of integral sanitation, each cell is provided with one bucket that is emptied only every 16 hours. The bucket causes a constant stench. In the absence of toiletries or soap, it is impossible to keep any standard of hygiene or health care. Food is inadequate and virtually inedible. Prisoners are given stale bread and rotten meat or fish every day. The kitchen in which the food is prepared is only 10 feet away from the toilets and is infested with vermin. There is infrequent access to medical treatment. Jainerine Persaud suffers from migraines and has not been provided with proper medical treatment, although this was prescribed by a doctor. There are no provisions for facilitating religious worship of any kind. Writing of letters is restricted to one letter per month and Deolal Sukhram is denied access to legal consultation on a regular basis. Counsel submits the affidavit of one Mr. Lawrence Pat Sankar, who was held at the State Prison at the same time as the authors, and who confirms the conditions of detention in the prison.

The complaint

3.1 The authors submit that the 34-month delay between arrest and trial is unreasonable and constitutes a violation of article 9, paragraph 3 of the Covenant. The delay in their case is comparable with the periods of delay in other cases in which the Committee found violations of article 9, paragraph 3 or article 14, paragraph 3 (c). They contend that the State party must organize its criminal justice system in such a way that such periods of delay do not occur.

3.2 The authors also claim that the delay of 4 years and 10 months from the sentence (on 19 January 1988) to the Court of Appeal's dismissal of the appeal (on 29 March 1993) is unreasonable and amounts to another violation of article 9, paragraph 3, of the Covenant. The authors submit that in assessing the reasonableness of the delay it is relevant to take into account that they were under sentence of death, and detained in unacceptable conditions.

3.3 The authors claim to be victims of a violation of articles 7 and 10, paragraph 1, on the ground that they were detained under appalling conditions. These prison conditions are said to have been repeatedly condemned by international human rights organizations as breaching internationally accepted standards and the United Nations Standard Minimum Rules for the Treatment of Prisoners.

3.4 The authors claim that after commutation of their death sentence, they remain detained in conditions which manifestly violate domestic Prison Rules standards, which govern the prisoners' entitlement to food, bedding, clothing, and the prison medical officer's responsibility to respond to complaints and take steps to alleviate the intolerable unsanitary conditions in the prison. This amounts to another violation of articles 7 and 10, paragraph 1, of the Covenant.

3.5 Relying on the Committee's general comments 7 and 9 on articles 7 and 10, respectively, and the Committee's jurisprudence, the authors argue that the conditions endured by them at each phase of the proceedings breached a minimum inviolable standard of detention conditions (to be observed regardless of a State party's level of development) and accordingly violated articles 7 and 10, paragraph 1, of the Covenant. The authors invoke the Committee's jurisprudence and other relevant judicial decisions.

3.6 Finally, the authors allege a violation of article 14, paragraph 1, read in conjunction with article 2, paragraph 3, in that they are being denied the right of access to court to complain about the other allegations of violations of their rights under the Covenant.

3.7 The authors submit that the right to present a constitutional motion is not effective in the circumstances of the present case, owing to the cost of instituting proceedings in the High Court to obtain constitutional redress, the absence of legal aid for constitutional motions, and the unwillingness of local lawyers to represent applicants pro bono. They invoke the Committee's jurisprudence to the effect that in the absence of legal aid, a constitutional motion did not constitute an effective remedy for the indigent author in that case. In this context, it is stated that the authors have exhausted all of their possible domestic remedies for purposes of article 5, paragraph 2 (b) of the Optional Protocol. It is further stated that the matter has not been submitted for examination to any other international instance.

4. Notwithstanding the Committee's request to the State party to present its observations on the case, made on 1 August 2000, 12 October 2001, 8 January 2002, and 28 May 2004, the State party has not commented on the admissibility and/or the merits of the case.

Issues and proceedings before the Committee

Consideration of admissibility

5.1 Before considering any claim contained in a communication, the Human Rights Committee must, in accordance with article 87 of its rules of procedure, decide whether or not it is admissible under the Optional Protocol to the Covenant.

5.2 The Committee has ascertained that the same matter is not being examined under another procedure of international investigation or settlement for the purposes of article 5, paragraph 2 (a), of the Optional Protocol.

5.3 With respect to the authors' possibility of filing a constitutional motion to the Supreme Court, the Committee notes that the authors have appealed their claims to the Court of Appeal and applied to the Privy Council for Special Leave to Appeal for Poor Persons, since the authors allegedly lack private funds, and legal aid was unavailable for such constitutional motions. Both these applications were dismissed. The Committee therefore considers that in the absence of legal aid, and in the absence of the State party's arguments to the contrary, a constitutional motion does not constitute an available remedy in the circumstances of the case. In the light of the above, the Committee finds that it is not precluded by article 5, paragraph 2 (b), of the Optional Protocol, from considering the communication.

5.4 The Committee considers that the authors' claims have been sufficiently substantiated for purposes of admissibility, and therefore proceeds to their examination on the merits insofar as they appear to raise issues under articles 2, paragraph 3, 7, 9, paragraph 3, 10, paragraph 1, and 14, of the Covenant. The Committee notes with concern the lack of any cooperation on the part of the State party. It is implicit in rule 91 of the Committee's rules of procedure and article 4, paragraph 2, of the Optional Protocol, that a State party to the Covenant should investigate in good faith all the allegations of violations of the Covenant made against it, and submit to the Committee written explanations or statements clarifying the matter and the remedy, if any, that may have been granted by it. In the circumstances, due weight must be given to the authors' allegations, to the extent that they have been adequately substantiated.

5.5 To the extent that the authors have made a claim about the right to have access to Court under article 14, paragraph 1, of the Covenant, the Committee considers that they have not sufficiently substantiated this claim for purposes of admissibility.

Consideration of the merits

6.1 With regard to the authors' claims under article 9, paragraph 3, the Committee notes the authors were arrested in April 1985, that their trial began on 4 January 1988, and that the authors were kept in pre-trial detention throughout this period. That their pre-trial detention lasted 34 months is uncontested. The Committee recalls that pursuant to article 9, paragraph 3, anyone arrested or detained on a criminal charge shall be entitled to trial within a reasonable time or to release. What period constitutes a "reasonable time" within the meaning of article 9, paragraph 3, must be assessed on a case-by-case basis. A delay of almost three years, during which the authors were kept in custody cannot be deemed compatible with article 9, paragraph 3, in the absence of special circumstances justifying such delay. The Committee finds that, in the absence of any explanation from the State party, a delay of over 34 months in bringing the author to trial is incompatible with article 9, paragraph 3.

6.2 As to the claim of a delay of 4 years and 10 months between conviction and dismissal of the appeal, counsel has invoked article 9, paragraph 3, but as the issues raised clearly relate to article 14, paragraph 3 (c)a and 5, the Committee will examine them under that article. The Committee considers that a delay of 4 years and 10 months between the conclusion of the trial on 19 January 1988 and the dismissal of the authors' appeal on 29 March 1993 is incompatible with the provisions of the Covenant, in the absence of any explanation from the State party justifying the delay. The Committee accordingly concludes that there has been a violation of article 14, paragraph 5 in conjunction with paragraph 3 (c), of the Covenant.

6.3 As to the authors' claim that their conditions during each stage of their imprisonment violated articles 7 and 10, paragraph 1, the Committee must give due consideration to them in the absence of any pertinent State party observation in this respect. The Committee considers that the authors' conditions of detention as described in paragraphs 2.3, 2.4 and 2.5 violate their right to be treated with humanity and with respect for the inherent dignity of the human person, and are therefore contrary to article 10, paragraph 1, of the Covenant. In the light of this finding in respect of article 10, a provision of the Covenant dealing specifically with the situation of persons deprived of their liberty and encompassing for such persons the elements set out generally in article 7, it is not necessary separately to consider the claims arising under article 7 of the Covenant.

7. The Human Rights Committee, acting under article 5, paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights, is of the view that the facts before it disclose a violation of articles 9, paragraph 3, 10, paragraph 1, and article 14, paragraph 5 in conjunction with paragraph 3 (c), of the Covenant.

8. In accordance with article 2, paragraph 3 (a), of the Covenant, the State party is under an obligation to provide the authors with an effective remedy, including adequate compensation. In the light of the long period spent by the authors in deplorable conditions of detention that violate article 10 of the Covenant, the State party should consider release of the authors. The State party should, in any event, improve the conditions of detention in its prisons without delay.

9. On becoming a State party to the Optional Protocol, Trinidad and Tobago recognized the competence of the Committee to determine whether there has been a violation of the Covenant or not. This case was submitted for consideration before Trinidad and Tobago's denunciation of the Optional Protocol became effective on 27 June 2000; in accordance with article 12 (2) of the Optional Protocol it continues to be subject to the application of the Optional Protocol. Pursuant to article 2 of the Covenant, the State party has undertaken to ensure to all individuals within its territory or subject to its jurisdiction the rights recognized in the Covenant and to provide an effective and enforceable remedy in case a violation has been established.

The Committee wishes to receive from the State party, within 90 days, information about the measures taken to give effect to the Committee's Views. The State party is requested to publish the Committee's Views.

[Adopted in English, French and Spanish, the English text being the original version. Subsequently to be issued also in Arabic, Chinese and Russian as part of the present report.]

Note

[1] Initially, the Optional Protocol entered into force for Trinidad and Tobago on 14 February 1981. On 26 May 1998, the Government of Trinidad and Tobago denounced the Optional Protocol to the International Covenant on Civil and Political Rights. On the same day, it re-acceded, including in its instrument of re-accession a reservation "to the effect that the Committee shall not be competent to receive and consider communications relating to any prisoner who is under sentence of death in respect of any matter relating to his prosecution, his detention, his trial, his conviction, his sentence or the carrying out of the death sentence on him and any matter connected therewith". The communication was submitted to the Committee before the denunciation and the re-accession with a reservation entered into force, on 26 August 1998. On 2 November 1999, the Committee decided that this reservation was not valid, as it was not compatible with the object and purpose of the Optional Protocol. On 27 March 2000, the Government of Trinidad and Tobago denounced the Optional Protocol again.

S. Communication No. 943/2000, *Guido Jacobs v. Belgium* (Views adopted on 7 July 2004, eighty-first session)*

Submitted by:	Guido Jacobs (not represented by counsel)
Alleged victim:	The author
State party:	Belgium
Date of communication:	15 March 2000 (initial submission)

The Human Rights Committee, established under article 28 of the International Covenant on Civil and Political Rights,

Meeting on 7 July 2004,

Having concluded its consideration of communication No. 943/2000 submitted to the Committee by Guido Jacobs under the Optional Protocol to the International Covenant on Civil and Political Rights,

Having taken into account all written information made available to it by the author of the communication and the State party,

Adopts the following:

Views under article 5, paragraph 4, of the Optional Protocol

1. The author is Mr. Guido Jacobs, a Belgian citizen, born on 21 October 1948 at Maaseik (Belgium). He claims to be a victim of violations by Belgium of articles 2, 3, 14, paragraph 1, 19, paragraph 1, 25 and 26 of the International Covenant on Civil and Political Rights. He is not represented by counsel.

(The Covenant entered into force for Belgium on 21 July 1983 and the Optional Protocol to the Covenant on 17 August 1994.)

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* The following members of the Committee participated in the examination of the present communication: Mr. Abdelfattah Amor, Mr. Prafullachandra Natwarlal Bhagwati, Mr. Franco Depasquale, Mr. Maurice Glèlè Ahanhanzo, Mr. Walter Kälin, Mr. Ahmed Tawfik Khalil, Mr. Rajsoomer Lallah, Mr. Rafael Rivas Posada, Sir Nigel Rodley, Mr. Martin Scheinin, Mr. Ivan Shearer, Mr. Hipólito Solari Yrigoyen, Ms. Ruth Wedgwood and Mr. Roman Wieruszewski.

The text of a concurring individual opinion signed by Committee member, Ms. Ruth Wedgwood, is appended to the present document.

The facts as submitted by the author

2.1 On 2 February 1999 the *Moniteur belge* published the Act of 22 December 1998 amending certain provisions of part two of the Judicial Code concerning the High Council of Justice, the nomination and appointment of magistrates and the introduction of an evaluation system.

2.2 As amended, article 259 bis-1, paragraph 1, of the Judicial Code provides that the High Council of Justice[1] shall comprise 44 members of Belgian nationality, divided into one 22-member Dutch-speaking college and one 22-member French-speaking college. Each college comprises 11 justices and 11 non-justices.

2.3 Article 259 bis-1, paragraph 3, stipulates:

> "The group of non-justices in each college shall have no fewer than four members of each sex and shall be composed of no fewer than:
>
> 1. Four lawyers with at least 10 years' professional experience at the bar;
>
> 2. Three teachers from universities or colleges in the Flemish or French communities with at least 10 years' professional experience relevant to the High Council's work;
>
> 3. Four members holding at least a diploma from a college in the Flemish or French community and with at least 10 years' professional experience in legal, economic, administrative, social or scientific affairs relevant to the High Council's work […]."

2.4 Article 259 bis-2, paragraph 2, also stipulates:

> "Non-justices shall be appointed by the Senate by a two-thirds majority of those voting. Without prejudice to the right to submit individual applications, candidates may be put forward by each of the bar associations and each of the universities and colleges in the French community and the Flemish community. In each college, at least five members shall be appointed from among the candidates proposed."

2.5 Lastly, in accordance with paragraph 4 of the same article, "a list of alternate members of the High Council shall be drawn up for the duration of the term […]. For non-justices this list shall be drawn up by the Senate […] and shall comprise the candidates who are not appointed".

2.6 Article 259 bis-2, paragraph 5, stipulates that nominations should be sent to the Chairman of the Senate, by registered letter posted within a strict deadline of three months following the call for candidates.

2.7 On 25 June 1999, the Senate published in the *Moniteur belge* a call for candidates for a non-justice seat on the High Council of Justice.

2.8 On 16 September 1999, Mr. G. Jacobs, first legal assistant in the Council of State, submitted his application within the legal three-month period.

2.9 On 14 October 1999, the Senate published a second call.

2.10 On 29 December 1999, the Senate elected the members of the High Council of Justice. The author was not elected but was included in the list of alternates for non-justices as provided in article 295 bis-2, paragraph 4.

The complaint

3.1 The author alleges violations of the rule of law, namely the Act of 22 December 1998, and of the Senate's application of that rule.

3.2 With regard to the rule of law, the author considers that article 259 bis-1, paragraph 3, violates articles 2, 3, 25 and 26 of the Covenant on the following grounds.

3.3 The author claims that the introduction of a gender requirement, namely that four non-justice seats in each college be reserved for women and four for men, makes it impossible to carry out the required comparison of the qualifications of candidates for the High Council of Justice. In his view, such a condition means that candidates with better qualifications may be rejected in favour of others whose only merit is that they meet the gender requirement. The author claims that, in his case, the gender requirement works against male candidates but it could in the future be disadvantageous to women, and that this is discriminatory.

3.4 The author also maintains that it is strictly forbidden to apply a gender requirement to appointments by third parties (employers) under the Act of 7 May 1999 on the equal treatment of men and women with regard to working conditions, access to employment and promotion opportunities, access to an independent profession and supplementary social security schemes. The author maintains that the High Council of Justice comes under this Act, and that the application of the gender requirement in this regard is thus discriminatory.

3.5 In the author's view, on the basis of an analysis by the legal department of the Council of State,[2] application of the gender requirement to the entire group of non-justices could equally lead to discrimination among the candidates in the three categories within that group.

3.6 As to the application of the rule of law, the author considers that the Flemish non-justices were appointed without regard for established procedure, with no interviews or any attempt at profiling the candidates, and without comparing their qualifications, in violation of articles 2, 19 and 25 of the Covenant.

3.7 The author claims that the key criterion for these appointments was membership of a political party, that is, nepotism: non-justice seats were allocated to the sister of a senator, a senator's assistant and a minister's personal assistant. The candidates' required records of 10 or more years of professional experience relevant to the High Council's work were neither considered nor compared. He adds that one senator resigned in protest against political nepotism and informed the press of his views, and that a candidate sent a letter to the senators demonstrating that his qualifications were superior to those of the successful candidates.

3.8 The author contends that the application of the gender requirement also led to a violation of the principle of equality inasmuch as the appointment of men only, in the category of university professors, created inequality among the various categories of the non-justice group.

3.9 The author claims that the effect of a second call for candidates for one of the non-justice seats was to accept candidatures after the closing date for applications following the first call, which is illegal and discriminatory.

3.10 The author also argues that the appointment of non-justice alternates in alphabetical order is against the law, demonstrates that qualifications are not compared and results in discrimination between the appointed candidates and the alternates.

3.11 Lastly, the author states that there is no appeal procedure for contesting the above-mentioned violations for the following reasons.

3.12 He considers that article 14 of the coordinated laws on the Council of State does not allow any appeal to the Council of State concerning appointments. He also concludes that it is not possible to request the Court of Arbitration[3] for a preliminary ruling on article 259 bis-1 of the Act of 22 December 1998.

3.13 In the author's view, the jurisdiction of the Council of State when trying cases of abuse of power derives from article 14, paragraph 1, of the above-mentioned laws, which stipulates that the administrative section hands down decisions on applications for annulment filed on grounds of breach of forms of action, either appropriate or prescribed on pain of avoidance, overstepping or wrongful use of authority, against acts or regulations of the various administrative authorities or administrative rulings in disputes.

3.14 The author states that decisions by the legislature fall outside the competence of the Council of State and that, until 1999, the same applied in principle to all acts, even administrative acts, of a body of any of the legislative assemblies. In this connection, he cites Council of State ruling No. 69/321 of 31 October 1997, which dismissed, on the grounds that the Council was not competent to rule on the legality of the act in question, an application for annulment brought by Mr. Meester de Betzen-Broeck against a decision by the Council of the Brussels-Capital Region not to include him in the recruitment reserve for a job as an accountant because he had failed the Regional Council's language test. He also refers to Court of Arbitration ruling No. 31/96 of 15 May 1996, issued in response to the Council of State's request for a preliminary ruling in the same proceedings (Council of the Brussels-Capital Region) on article 14, paragraph 1, of the coordinated laws on the Council of State. The plaintiff in that ruling claimed that article 14 violated the principle of equality in that it did not allow the Council of State to hear appeals against purely administrative decisions by legislative assemblies concerning civil servants. The Court of Arbitration ruled that the absence of a right of appeal against administrative decisions by a legislative assembly or its bodies, whereas such an action could be brought against the administrative decisions of an administrative authority, violated the constitutional principles of equality and non-discrimination. The Court further considered that the discrimination did not stem from article 14 but was rather the result of a gap in the legislation, namely the failure to institute a right of appeal against administrative decisions by legislative assemblies and their bodies.

3.15 Lastly, and as a subsidiary claim, the author cites this failure to institute a remedy against the Senate's appointment of non-justice members of the High Court of Justice as a violation of articles 2 and 14 of the Covenant, inasmuch as such a remedy can be sought against administrative decisions by an administrative authority.

3.16 The author adds that he has not been able to appeal against the provision in question, namely, article 295 bis-1, paragraph 3, directly to the Court of Arbitration, since the required legitimate interest was lacking during the six-month period allowed for appeal. In his view, the interest condition was met only when his application was submitted and validated, in other words, outside the six-month limit. The author also emphasizes that he could not have known that the provision in question would necessarily give rise to an illegal appointment.

3.17 The author considers that he has met the condition of having exhausted domestic legal remedies and states that the matter has not been submitted to another procedure of international investigation or settlement.

The State party's observations on the admissibility of the communication

4.1 In its observations of 12 March 2001 and 23 August 2002, the State party disputes the admissibility of the communication.

4.2 As regards the rule of law, the State party maintains that the Special Act on the Court of Arbitration of 6 January 1989 did permit the author to appeal against the relevant part of the Act of 22 December 1998.

4.3 The State party says that the Court of Arbitration rules, inter alia, on applications for annulment of an act or part thereof on grounds of a violation of articles 6 and 6 bis of the Constitution. These articles - now articles 10 and 11 - of the Constitution enshrine the principles of equality and non-discrimination and are general in their scope. Article 11 prohibits all discrimination, whatever its origin. The State party stresses that the principle of non-discrimination contained in the Constitution applies to all the rights and freedoms granted to Belgians, including those flowing from international treaties to which Belgium has acceded.[4]

4.4 The State party specifies that article 2, 2° of the Court of Arbitration Act provides that appeals may be lodged by any physical person or legal entity with a proven interest. In the State party's view, the Court of Arbitration gives "interest" a wide interpretation, that is, from the moment when an individual may be affected, directly and adversely, by the rule disputed. Article 3, paragraph 1, of the Act also stipulates that applications to overturn an act must be lodged within six months of its publication.

4.5 The State party recalls that article 295 bis-1, paragraph 3, of the Judicial Code was published in the *Moniteur belge* on 2 February 1999, which means that the time limit for an appeal to the Court of Arbitration expired on 2 August 1999. The call for non-justice candidates for the High Council of Justice was published on 25 June 1999. Following this call, which repeated the provision in question, the author submitted his application to the Senate. In the State party's view, it should be noted that when the call for candidates was published, Mr. G. Jacobs was within the legal time limit for requesting the Court of Arbitration to overturn the provision in question. The State party considers that the author met the necessary conditions and had the necessary interest for lodging such an appeal.

4.6 As regards the application of the rule of law, the State party points out that the author had the possibility of lodging an appeal with the courts and tribunals of the Belgian judiciary.

4.7 The State party contends that a court is expected to hear subjective disputes, the status of which is governed by articles 144 and 145 of the Constitution. Article 144 attributes exclusive jurisdiction to the court in disputes concerning civil rights while article 145 confers on the court provisional powers, which the law may override, in disputes concerning political rights. In the State party's view, legislative bodies therefore remain subject to supervision by the courts and tribunals insofar as their decisions concern civil or political rights.

4.8 The State party considers that the author does not show that he would be unable to challenge the legality of the Senate's decision in the courts and tribunals of the judiciary in the context of a dispute relating to civil or political rights. In the State party's view, the provision in dispute does not therefore have the effect of depriving the author of all legal remedies since Mr. G. Jacobs can assert his rights as regards the Senate's appointment of members of the High Council of Justice in the ordinary courts.

4.9 As regards the subsidiary claim of violation of the principles of equality and non-discrimination due to the failure to institute a remedy against the Senate's decision to appoint non-justice members to the High Council of Justice whereas such action could be introduced against the administrative decisions by an administrative authority, the State party maintains that the author cannot legitimately invoke Court of Arbitration ruling No. 31/96 of 15 May 1996, insofar as it was pursuant to this ruling that the coordinated laws on the Council of State were amended. Article 14, paragraph 1, provides: "The section hands down decisions on applications for annulment filed on grounds of breach of forms of action, either appropriate or prescribed on pain of avoidance, overstepping or wrongful use of authority, against acts or regulations of the various administrative authorities, or against administrative decisions by legislative assemblies or their organs, including the mediators instituted within such assemblies, the Court of Accounts and the Court of Arbitration, and the organs of the judiciary and the High Council of Justice, concerning public contracts and the members of their personnel."

4.10 The State party explains that in the case in question the appointment of members of the High Council of Justice cannot be considered a purely administrative act by the Senate but is to a large extent an act forming part of the exercise of its legislative powers. It stresses that the establishment of the High Council of Justice is of great importance in society and cannot be compared with the recruitment of personnel by the legislature. Reference should be made here to the constitutional principle of the separation of powers. In the State party's view, this implies that an authority subordinate to one branch of government cannot substitute its judgement for that of an authority stemming from another branch exercising its discretion, such as the legislature's discretionary power in the appointment of members of the High Council of Justice. Referring to Court of Arbitration ruling No. 20/2000 of 23 February 2000 and ruling No. 63/2002 of 28 March 2002, the State party explains that, based on the principle of the separation of powers, it may be maintained that the appointment of members of the High Council of Justice is not subject to appeal since the legislature, which includes the Senate, is independent. The State party therefore considers that the lack of an appeal to the Council of State to challenge the appointment of the members of the High Council of Justice is in no way a violation of the principles of equality and non-discrimination since such appointment may be compared to a legislative decision.

The author's comments on the State party's observations concerning admissibility

5.1 In his comments of 14 July 2001 and 13 October 2002 the author maintains and develops his arguments.

5.2 As to the rule of law, the author disputes the State party's argument on the possibility of application to the Court of Arbitration for annulment. He asserts that an appeal could not be lodged until the applications for appointment had been accepted or at least submitted, since before this any appeal would have constituted an actio popularis. Mr. Jacobs' application was submitted on 16 September 1999 and accepted on 21 September 1999, that is, after the six-month legal time limit for appeal set out in the Act of 2 February 1999. The author concludes that he therefore did not meet the condition of direct, personal and definite interest for filing an appeal within the required period.

5.3 Concerning the application of the rule of law, the author begins by considering that the lack of an appeal to the Council of State in his case is confirmed by the State party's observations and therefore constitutes a violation of articles 2 and 14 of the Covenant. Contrary to the State party, the author considers, as does the Court of Arbitration in its ruling No. 31/96, that the separation of powers cannot be interpreted as implying that the Council of State has no jurisdiction when a legislative body is party to the dispute to be decided, and that appointments by the Senate cannot be regarded as legislative decisions. With reference to the rulings of the Court of Arbitration cited by the State party (No. 20/2000 and No. 63/2002), the author points out that at the time this was a matter of internal organization among members of Parliament or justices, while he contends that in the case in question it is a matter of appointments to a sui generis entity at the intersection of the separate branches of government and not part of the legislature as such; this means that the lack of any appeal against the appointment of its members violates the principle of equality.

5.4 The author adds that the State party's argument comparing "the importance in society" of members of the High Council and personnel in the legislature is of no relevance whatsoever. He considers that the reference to discrimination concerns not these two groups but rather decisions emanating from a legislative assembly (in this case the appointment of members of the High Council of Justice) and from an administrative authority (the appointment of justices), and that it is also unclear how "importance in society" might justify the lack of any appeal, particularly as such a check on lawfulness in no sense means that the court which rules on the appeal may substitute its judgement for that of another authority exercising discretionary power.

5.5 As regards the State party's argument as to the appeal the author might lodge with the courts and tribunals of the judiciary, first, concerning the question of access to Belgian courts, the author considers that the State party cannot simply confine itself to a general reference to the Constitution without precise indications as to the specific legal basis required to bring an action and as to the competent court. The State party also, he says, omits any reference to the relevant applicable case law. As to the case law of the European Court of Human Rights,[5] the author maintains that when citing local remedies the defendant State must prove that its legal system offers opportunities for efficient and appropriate remedies, something the State party does not do adequately in the current case.

5.6 The author claims that the lack of an appropriate appeal mechanism means that the courts cannot put an end to the violation. In the case in question, the courts cannot annul the disputed decision. Furthermore, for cases in which Parliament has some degree of discretion, the court cannot order compensation in kind (lack of a positive injunction). Believing that the State party probably refers to the possibility of bringing the matter before the Court of First Instance pursuant to article 1382 of the Civil Code, and asserts that this would not be an effective action. Supposing that a claim for damages could be considered an appropriate appeal mechanism, it is, in the author's view, an impossible action to bring in practice. Citing various legal analyses concerning Belgium, the author concludes that the legislature and the judiciary cannot be held legally responsible.

The State party's observations on the merits of the communication

6.1 In its observations of 12 March 2001 and 23 August 2002, the State party asserts that the communication is without grounds.

6.2 As regards the rule of law, the State party explains that the objective being pursued is to ensure an adequate number of elected candidates of each sex. It adds that the presence of women on the High Council of Justice corresponds to the wish of Parliament to encourage equal access by men and women to public office in accordance with article 11 bis of the Constitution.

6.3 Recalling the debate on this issue during the *travaux préparatoires* for the Act of 22 December 1998, the State party stresses that legislators felt there should be no fewer than 4 men and 4 women among the 11 justices and the 11 non-justices, in order to avoid any underrepresentation of either sex in either group. In the State party's view, the report on this proposal further underlines that, since the High Council of Justice also serves as an advisory body, each college must be composed of members of both sexes. Parliament thus wished to apply the principles set out in the Act of 20 July 1990 to encourage balanced representation of men and women on advisory bodies. The State party considers that it follows from this that the provision in question, namely, article 295 bis-1, paragraph 3, has a legitimate objective.

6.4 The State party further maintains that the provision for 4 out of the 11 candidates - or just over one third - to be of a different sex does not result in a disproportionate restriction on candidates' right of access to the civil service. This rule is intended to ensure balanced representation of the two sexes and, in the State party's view, is both the only means of attaining the legitimate goal and also the least restrictive.

6.5 The State party accordingly considers that these provisions to ensure effective equality do not depart from the principles which prohibit discrimination on grounds of sex.

6.6 As regards the allegation of discrimination among persons appointed by the legislative authorities and by third parties, the State party refers to the Act of 20 July 1990 to encourage balanced representation of men and women on bodies with advisory capacity. It says that this Act imposes some degree of gender balance and is applicable whenever a body - for example, the High Council of Justice - has advisory capacity. The State party therefore considers that there is no discrimination since the gender balance rule applies to all consultative bodies.

6.7 As to the author's reference to employers in support of the allegation of discrimination against him, the State party asserts that the aforementioned Act of 7 May 1999 is not applicable in this case, and refers to article 3, paragraph 1, of the Act which describes workers in the following terms: "Persons who perform work under a contract of employment and persons who perform work under the authority of a third party other than under a contract of employment, including apprentices." In the State party's view, the author's reasoning falls short in legal terms since he compares situations which are not comparable: the members of the High Council of Justice cannot be described as "workers" within the meaning of the aforementioned Act, since they do not perform work.

6.8 As to the allegation of discrimination by subgroup, the State party, referring to the *travaux préparatoires* for the Act of 22 December 1998,[6] points out that the legislature did indeed take account of the observations of the Council of State to which the author refers. It stresses that the Government has submitted an amendment to an amendment to modify paragraph 3 of article 295 bis-1 by adding that the group of non-justices should include at least four members of each sex in each college.

6.9 In the State party's view, then, the Act has redressed the balance between the aim of the measure, namely to promote equality between men and women where it might not currently exist, and one of the principal aims of the law, namely to establish a High Council of Justice made up of individuals objectively selected for their competence. The State party explains, on the one hand, that the group of non-justices, the counterpart to the group of justices, is a distinct group whose members must all have 10 years' experience; and on the other, that within the groups of justices and non-justices, the rules relating to the sex of candidates are reasonable and justified by the legitimate ends sought by those rules.

6.10 With regard to the application of the rule of law and the complaint that the non-justices were appointed on the basis of their membership of a political party, the State party explains that the High Council of Justice was created, and the mandate system introduced, by the amendment of article 151 of the Constitution. That article sets forth the basic principles regarding the independence of the judiciary, the composition and terms of reference of the High Council of Justice, the procedures for appointing and designating magistrates, and the mandate and evaluation systems.

6.11 The State party argues that, although the High Council of Justice is regulated by article 151 of the Constitution, its composition (justices and non-justices) and its terms of reference (it has no judicial powers) preclude its being considered as a body representing the judiciary. The Council is in effect a sui generis body and does not form part of any of the three branches of government. According to the State party, it is an intermediary body linking the judiciary (whose independence it is bound to respect), the executive and the legislature.

6.12 The State party explains that the presence of non-justices helps the justices to avoid too narrow an approach to their work on the Council, and makes an essential contribution in terms of the perspective and experience of those exposed to the strictures of the law. The State party maintains, however, that this does not entail appointing individuals who are incapable of assisting the High Council in the performance of its tasks.

6.13 The State party further claims that, for the appointment of non-justices, there was every reason to establish a system that aimed, on the one hand, to prevent intervention by political bodies and thus further "politicization" and, on the other, to compensate for the inevitably somewhat undemocratic nature of the choice of candidates put forward by each of the occupational groups concerned.

6.14 According to the State party, it was for this reason that Parliament opted in the Constitution for a mixed system in which all non-justices are appointed by the Senate on a two-thirds majority of votes cast, but 5 of the 11 vacant places in each college must be filled with candidates put forward by the bar associations, colleges and universities. The system allows each of these institutions to put forward one or more candidates who meet the legal requirements (not necessarily belonging to the same occupational groups as the submitting group) and are considered suitable for office.

6.15 In the State party's opinion, the purpose and the effect of creating the High Council of Justice was to depoliticize judicial appointments. Candidates must be elected by the Senate, by a two-thirds majority of those voting, i.e., a relative majority, which ensures depoliticization of the system.

6.16 The State party also describes in detail the procedure applied in appointing the non-justices in the case under consideration.

6.17 In all, there were 106 non-justice candidates, 57 French speakers and 49 Dutch speakers; their curricula vitae and files were available for consultation by senators at the Senate registry. Given the large number of candidates, it was decided, for practical reasons, not to conduct interviews. Allowing 15 to 30 minutes per person, interviewing 106 candidates would have taken a minimum of 26½ to 53 hours. The constraints of the parliamentary timetable made it impossible to devote that amount of time to interviews. It would have meant either setting aside several successive days or staggering the interviews over a period of weeks. In any case, it would not have been possible to conduct interviews in similar conditions for all candidates, since the same senators would probably not have been able to attend every one. Thus, according to the State party, a document-based procedure provided the best means of observing the principle of non-discrimination. The State party also emphasizes that the Senate has no constitutional, legal or regulatory obligation to conduct interviews.

6.18 The State party recalls that the appointment of non-justices must take into account five different criteria (each college must comprise at least four lawyers, three teachers from a college or university in the French or Flemish Community, four members who hold at least one qualification from a college in the French or Flemish Community, four members of each sex and five members put forward by universities, colleges and/or bar associations); it explains that, because of the number of criteria and the overlap between them, the Senate bodies decided to draw up a list of recommended candidates. Any other procedure, it seems, would have been unworkable, or even have discriminated against certain candidates. Taking a vote on each individual, for example, would have meant organizing at least 22 separate ballots. If in one such ballot no candidate obtained a two-thirds majority, as might well be expected, a second round of voting would have to be organized, thereby increasing the total number of ballots. At the same time, it would have been necessary to ensure, from ballot to ballot, that all the membership requirements for each college had been met: if, after eight members of, say, the French-speaking college had been appointed, the Senate had found it had appointed only one lawyer candidate, only the remaining lawyer candidates would still have been eligible. At some point, then, it might have become possible only to vote for certain candidates. The same problem would have arisen had the voting been based on categories. The State party points out that the use of the recommended list method in nomination and appointment procedures is established practice in the Senate and the Chamber of Representatives.

6.19 In order to draw up the list of recommended candidates, the officers of the Senate met on 17 December 1999, French speakers and Dutch speakers separately. It was decided to allow one member of each political group to attend the meeting. This made it possible for all groups, including the only one not represented among the Senate officers, to take an active part in the consideration of the candidates. The officers received all candidates' curricula vitae in advance of the meeting, and the candidates' files were available for consultation at the Senate registry once applications had closed. The representatives of the political groups examined the curricula vitae of all candidates during the meetings held to draw up the list, and all the candidates' files and curricula vitae were therefore available throughout each meeting. The procedure adopted to draw up the recommended list for the Dutch-speaking college, for example, was described in detail at the Senate plenary of 23 December 1999. As explained at the time, the first Vice-President of the Senate went through all the applications one by one and, when each participant had given an opinion, 16 candidates were selected. The list of 16 candidates was then considered in relation to the 5 above-mentioned criteria and 13 candidates were retained (for 11 seats). Finally, after a lengthy discussion, the names of 11 candidates were chosen for the list.

6.20 In actually appointing the non-justices at the plenary of 23 December 1999, senators had the option, in a secret ballot, of either approving the recommended list or, if the list did not meet with their agreement, selecting candidates themselves. They were therefore given a two-part ballot paper, with (a) the recommended list of 11 French-speaking candidates and 11 Dutch-speaking candidates and with a single box to be marked; and (b) a list of all the candidates' names, divided into three categories, "qualification-holders", "lawyers" and "teachers", with a box beside each name. The ballot paper also included the legal provisions stipulating the criteria for membership of the Council. Those members who supported the recommended list were required to mark the box above that list. Those who did not wish to approve the recommended list were required to cast 22 votes for their preferences, with a maximum of 11 for French-speaking candidates and 11 for Dutch-speaking candidates.

6.21 The result of the secret ballot was as follows:

Votes cast: 59

Blank or spoiled ballots: 2

Valid votes: 57

Two-thirds majority: 38

The recommended list obtained 54 votes.

6.22 Thus, according to the State party, it can be seen that a thorough examination of the candidates' curricula vitae and a comparison of their qualifications took place before either the recommended list was drawn up or the Senate plenary made the appointments. Furthermore, the State party considers that the author's complaints about politicization and nepotism are based on statements in the press and are unsupported by any evidence.

6.23 With regard to the complaint of discrimination between the subgroups, the State party refers to its arguments on the rule of law, presented above.

6.24 As to the complaint of discrimination between candidates in connection with the Senate's second call for applications, the State party explains that the second call was issued because the first call had produced insufficient applications: for the Dutch-speaking college there had been two applications from female candidates, yet, under article 295 bis-1, paragraph 3, of the Judicial Code, the group of non-justices in the High Council must comprise at least four members of each sex, per college, and that requirement must be met at the time the Council is constituted. The State party explains that the law, the case law of the Council of State, and parliamentary practice all permitted the Senate to issue a second call for applications, and that the second call was addressed to all who wished to apply, including those who had already responded to the first call (thus allowing the author to resubmit his application). Furthermore, according to the State party, applications sent in response to the first call remained valid, as was explicitly stated in the second call. The State party concludes that there was no discrimination and emphasizes that, without a second call for applications from non-justices, it would not have been possible to form a High Council of Justice in accordance with the Constitution.

6.25 In response to the complaint of discrimination on the grounds that the non-justice alternates had been ranked in alphabetical order, unlike the justices, the State party points out that the law on the one hand explicitly stipulates that the justices shall be ranked by number of votes obtained, and on the other leaves the Senate free to rank the non-justices as it pleases.[7] However, according to the State party, an alphabetical listing of the candidates does not imply an alphabetical order of succession. The State party explains that the order of succession in fact depends on which seat falls vacant, i.e. which subgroup the outgoing non-justice belongs to. When a seat falls vacant, the Senate must appoint a new member, and in order to do so it must first determine the profile of the successor, i.e. determine what conditions the new member must fulfil if the composition of the Council is to continue to comply with the law. In the first place, then, it must establish which candidates are eligible, and that will depend on the qualifications of both the retiring or deceased member and the remaining members. All candidates whose appointment would be consistent with the equitable arrangements required by law will be eligible for appointment. It is therefore quite incorrect to claim that the successors would have been appointed in alphabetical order, in violation of the principle of equality.

Comments by the author on the State party's observations concerning the merits of the communication

7.1 In his comments of 14 July 2001, 15 February 2002 and 13 October 2002, the author stands by his complaints against the State party.

7.2 Referring to the Kalanke judgement (European Court judgement C-450/93, of 17 October 1995), which found that there is discrimination where persons with equal qualifications are automatically given priority on grounds of sex in sectors where they are underrepresented, the author repeats that, in this case, the principle of appointment on a quota basis, i.e. without comparing applicants' qualifications, is a violation of the principle of equality. The author adds that, while female applicants might be given priority where applicants of different sexes had equal qualifications (although that in itself might be questionable), that would nevertheless be possible only provided the rules guaranteed that, in every individual case where a male/female applicant had equivalent qualifications to a female/male applicant, an objective evaluation of the applications would be made, examining all the requirements to be met by the individual applicant, and that, where one or more of the qualifications tipped the balance in favour of the female or male applicant, any priority given to men or women would be waived. In the author's view, fixed quotas - and, even more, floating quotas - prevent this from happening. The author also contends that the State party's argument that, in this case, the only way to ensure balanced representation of the two sexes is to introduce quotas, is baseless and unacceptable. The author maintains that there are other steps Parliament could take, namely the elimination of social barriers, to facilitate access to such positions by particular groups. He adds that there is no inequality between men and women in the case under consideration, since too few applications were submitted by the group of women (applications from only two Dutch-speaking women following the first call), which, in the author's view, means that the purpose of the exercise is illegitimate. The author also points out that the State party's reference to article 11 bis of the Constitution is irrelevant insofar as that article was added on 21 February 2002, and thus did not exist at the time the disputed rule was established.

7.3 As to the complaint of discrimination between individuals appointed by the legislature and those nominated by third parties, the author contests the State party's invocation of the Act of 20 July 1990, on the promotion of balance between men and women in advisory bodies, insofar as, in his view, the High Council of Justice is more than simply an advisory body. The author claims it is the Act of 7 May 1999 on equal treatment of men and women - which prohibits gender requirements - that is applicable in this case. He considers that it is applicable to the Senate's call for applications on the one hand, since it covers public-sector employers in particular, and to the members of the High Council of Justice on the other hand, since, in his view, and contrary to the State party's contention, they do perform work. He does nevertheless acknowledge that that work is not performed "under the authority of another person", as the law in question requires.

7.4 Concerning the complaint of discrimination against a subgroup, the author recalls that, following the advice of the Council of State, Parliament had indeed made a distinction between the group of justices and the group of non-justices. He maintains, however, that in setting quotas for the non-justices, Parliament repeated the very error the Council of State had warned against. As a result, the author believes, there is an imbalance that cannot be rationally justified between, on the one hand, the degree of institutionalized discrimination among candidates for high public office and, on the other, the promotion of equality between men and women (which is supposedly lacking) and one of the principal aims of the Act, which is to create a High Court of Justice composed of individuals selected for their abilities.

7.5 In respect of the application of the rule of law, the author claims that non-justice members were appointed on political grounds and that there was no comparison of the candidates' qualifications, again because of the establishment of quotas favouring women.

7.6 The author repeats that the second call for candidates was illegal (the three-month time limit for submission of applications being a strict deadline) and asserts that it allowed candidates to be appointed by virtue of their sex, thanks to the quota, and through nepotism. In the author's view, the High Council of Justice could have been constituted without a second call, insofar as article 151 of the Constitution, which establishes the Council, does not provide for quotas based on sex. As to the list of successors required by law, the author considers that such a list should govern the order of succession.

Issues and proceedings before the Committee relating to admissibility

8.1 In accordance with rule 87 of its rules of procedure, before considering any claims contained in a communication, the Human Rights Committee must decide whether or not the communication is admissible under the Optional Protocol to the Covenant.

8.2 The Committee has ascertained, as required under article 5, paragraph 2 (a) of the Optional Protocol, that the same matter is not being examined under another procedure of international investigation or settlement.

8.3 With regard to the contested provision, namely, article 295 bis-1, paragraph 3, of the Act of 22 December 1998, the Committee takes note of the State party's argument that the author could have appealed to the Court of Arbitration. After having also considered the author's arguments, the Committee is of the opinion that Mr. Jacobs is correct in maintaining that he was not in a position to lodge such an appeal since he was unable to meet the requirement of direct personal interest within the prescribed time limit of six months from publication of the Act, and he cannot be held responsible for the lack of a remedy (see paragraph 5.2).

8.4 The Committee further notes that the author was unable to submit an appeal to the Council of State, as indeed the State party confirms in arguing that the lack of a right of appeal was due to the principle of the separation of powers (see paragraph 4.10).

8.5 With regard to the application of the Act of 22 December 1998 and in particular article 295 bis-1, the Committee takes note of the author's claim that the remedies before certain other Belgian courts and tribunals mentioned by the State party did not constitute effective remedies in the present case. The Committee recalls that it is implicit in rule 91 of its rules of procedure and in article 4, paragraph 2, of the Optional Protocol, that a State party to the Covenant should submit to the Committee all information at its disposal, which, at the stage where the Committee must take a decision on the admissibility of a communication, means detailed information on the remedies available, in the particular circumstances of their case, to individuals claiming to be victims of violations of their rights. The Committee notes that the State party has referred only in general terms to the remedies available under Belgian law, and has failed to provide any information whatsoever on the remedy applicable in the present case, or to demonstrate that it would have been effective and available. In the light of these facts, the Committee considers that the author has met the conditions set forth in article 5, paragraph 2 (b) of the Optional Protocol.

8.6 With regard to the author's complaint of violations of article 19, paragraph 1, of the Covenant, the Committee considers that the facts presented are not sufficiently substantiated for the purposes of admissibility under article 2 of the Optional Protocol, in respect of this part of the communication.

8.7 With regard to the complaint of a violation of article 14, paragraph 1, of the Covenant, the Committee considers that the case under consideration is not concerned with the determination of rights and obligations in a suit at law; it is inconsistent *ratione materiae* with the article invoked and thus inadmissible under article 3 of the Optional Protocol.

8.8 Lastly, the Committee finds that the communication is admissible inasmuch as it appears to raise issues under articles 2, 3, 25 (c) and 26 of the Covenant, and should be considered as to the merits, in accordance with article 5, paragraph 2, of the Optional Protocol.

Consideration on the merits

9.1 The Human Rights Committee has examined the present communication in the light of all the written information communicated by the parties, as required under article 5, paragraph 1, of the Optional Protocol.

9.2 With regard to the complaints of violations of articles 2, 3, 25 (c) and 26 of the Covenant, arising from article 295 bis-1, paragraph 3, of the Act of 22 December 1998, the Committee takes note of the author's arguments challenging the gender requirement for access to a non-justice seat on the High Council of Justice on the grounds that it is discriminatory. The Committee also notes the State party's argument justifying such a requirement by reference to the law, the objective of the measure, and its effect in terms of the appointment of candidates and the constitution of the High Council of Justice.

9.3 The Committee recalls that, under article 25 (c) of the Covenant, every citizen shall have the right and opportunity, without any of the distinctions mentioned in article 2 and without unreasonable restrictions, to have access, on general terms of equality, to public service in his or her country. In order to ensure access on general terms of equality, the criteria and processes for appointment must be objective and reasonable. States parties may take measures in order to ensure that the law guarantees to women the rights contained in article 25 on equal terms with men.[8] The Committee must therefore determine whether, in the case before it, the introduction of a gender requirement constitutes a violation of article 25 of the Covenant by virtue of its discriminatory nature, or of other provisions of the Covenant concerning discrimination, notably articles 2 and 3 of the Covenant, as invoked by the author, or whether such a requirement is objectively and reasonably justifiable. The question in this case is whether there is any valid justification for the distinction made between candidates on the grounds that they belong to a particular sex.

9.4 In the first place, the Committee notes that the gender requirement was introduced by Parliament under the terms of the Act of 20 July 1990 on the promotion of a balance between men and women on advisory bodies.[9] The aim in this case is to increase the representation of and participation by women in the various advisory bodies in view of the very low numbers of women found there.[10] On this point, the Committee finds the author's assertion that the insufficient number of female applicants in response to the first call proves there is no inequality between men and women to be unpersuasive in the present case; such a situation may, on the contrary, reveal a need to encourage women to apply for public service on bodies such as the High Council of Justice, and the need for taking measures in this regard. In the present case, it appears to the Committee that a body such as the High Council of Justice could legitimately be perceived as requiring the incorporation of perspectives beyond one of juridical expertise only.

Indeed, given the responsibilities of the judiciary, the promotion of an awareness of gender-relevant issues relating to the application of law, could well be understood as requiring that perspective to be included in a body involved in judicial appointments. Accordingly, the Committee cannot conclude that the requirement is not objective and reasonably justifiable.

9.5 Secondly, the Committee notes that the gender clause requires there to be at least four applicants of each sex among the 11 non-justices appointed, which is to say just over one third of the candidates selected. In the Committee's view, such a requirement does not in this case amount to a disproportionate restriction of candidates' right of access, on general terms of equality, to public office. Furthermore, and contrary to the author's contention, the gender requirement does not make qualifications irrelevant, since it is specified that all non-justice applicants must have at least 10 years' experience. With regard to the author's argument that the gender requirement could give rise to discrimination between the three categories within the group of non-justices as a result, for example, of only men being appointed in one category, the Committee considers that in that event there would be three possibilities: either the female applicants were better qualified than the male, in which case they could justifiably be appointed; or the female and male applicants were equally well qualified, in which case the priority given to women would not be discriminatory in view of the aims of the law on the promotion of equality between men and women, as yet still lacking; or the female candidates were less well qualified than the male, in which case the Senate would be obliged to issue a second call for candidates in order to reconcile the two aims of the law, namely, qualifications and gender balance, neither of which may preclude the other. On that basis, there would appear to be no legal impediment to reopening applications. Lastly, the Committee finds that a reasonable proportionality is maintained between the purpose of the gender requirement, namely to promote equality between men and women in consultative bodies; the means applied and its modalities, as described above; and one of the principal aims of the law, which is to establish a High Council made up of qualified individuals. Consequently, the Committee finds that paragraph 3 of article 295 bis-1 of the Act of 22 December 1998 meets the requirements of objective and reasonable justification.

9.6 In the light of the foregoing, the Committee finds that article 295 bis-1, paragraph 3, does not violate the author's rights under the provisions of articles 2, 3, 25 (c) and 26 of the Covenant.

9.7 As regards the complaints of violations of articles 2, 3, 25 (c) and 26 of the Covenant arising from the application of the Act of 22 December 1998, and in particular article 295 bis-1, paragraph 3, the Committee takes note of the author's arguments claiming, in the first place, that the appointment of the Dutch-speaking non-justices, the group to which Mr. Jacobs belonged, was conducted without regard to an established procedure, without interviews, profiling or comparison of qualifications, being based rather on nepotism and political affiliation. The Committee has also examined the State party's arguments, which explain in detail the procedure for appointing the non-justices. The Committee notes that the Senate established and put into effect a special appointments procedure, viz.: first, a list of recommended candidates was drawn up after consideration and comparison of all applications on the basis of the relevant files and curricula vitae; secondly, each senator was given the choice of voting, in a secret ballot, either for the recommended list, or for a list of all the candidates. The Committee finds that this appointments procedure was objective and reasonable for the reasons made clear in the State party's explanations: before the recommended list was drawn up and the Senate made the appointments, each candidate's curriculum vitae and files were examined and their qualifications compared; the choice of a procedure based on files and curricula vitae rather than on interviews was prompted by the number of applications and the constraints of the parliamentary timetable, and there was no legal provision specifying a particular method of evaluation, such as interviews (para. 6.17); the choice of the recommended list method had to do with the large number of criteria and the overlap between them, and was a practice already established in the Senate and Chamber of Representatives; lastly, it was possible for the senators to make the appointments using two methods of voting, which guaranteed them freedom of choice. Furthermore, the Committee finds that the author's complaints that the appointment of candidates was made on the basis of nepotism and political considerations have not been sufficiently substantiated.

9.8 With regard to the complaint of discrimination between categories within the group of non-justices arising from the introduction of the gender requirement, the Committee finds that the author has not sufficiently substantiated this part of the communication and, in particular, has produced no evidence to show that any female candidates were appointed despite being less well qualified than male candidates.

9.9 With regard to the complaint of discrimination between applicants in connection with the Senate's second call for applications, and to the claim that the second call was illegal, the Committee notes that this call was issued because of the insufficient numbers of applications from women, i.e., two applications from women for the Dutch-speaking college - which the author concedes - whereas under article 295 bis-1, paragraph 3, each group of non-justices on the High Council of Justice must comprise at least four members of each sex. The Committee finds, therefore, that the second call was justified to allow the Council to be constituted and, furthermore, that there was no impediment to such action either in law or in parliamentary practice, particularly as the applications submitted in response to the first call remained valid.

9.10 As to the complaint of discrimination arising from the listing of non-justice alternates in alphabetical order, the Committee notes that article 295 bis-2, paragraph 4, of the Judicial Code gives the Senate the right to draw up the list of alternates but for them, unlike the justices, does not prescribe any particular method of ranking. Consequently it finds that, as shown by the State party's detailed argument, (a) the alphabetical order chosen by the Senate does not imply an order of succession; and (b) any succession in the event of a vacancy will require the appointments procedure to be conducted afresh. The author's complaints do not disclose a violation.

9.11 The Committee therefore finds that the application of the Act of 22 December 1998, and in particular of article 295 bis-1, paragraph 3, does not violate the provisions of articles 2, 3, 25 (c) and 26 of the Covenant.

10. The Human Rights Committee, acting under article 5, paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights, is of the view that the facts before it do not disclose a violation of any article of the Covenant.

[Adopted in English, French and Spanish, the French text being the original version. Subsequently to be issued also in Arabic, Chinese and Russian as part of the present report.]

Notes

[1] Article 151 of the Constitution instituting the High Council of Justice provides in paragraph 2:

> "One High Council of Justice exists for all of Belgium. In the exercise of its attributes the High Council of Justice shall respect the independence referred to in paragraph 1. It shall consist of a French-speaking college and a Dutch-speaking college. Each college shall have an equal number of members and shall be composed equally of judges and officials of the public prosecutor's office directly elected by their peers under the conditions and according to the form determined by law, and of other members nominated by the Senate by a two-thirds majority of those voting, under the conditions established by law.
>
> "Within each college there shall be a nomination and appointments committee and an advisory and investigative committee, on which representation shall be equally distributed as provided in the previous paragraph […]."

Paragraph 3:

> "The High Council of Justice shall exercise its authority in the following areas:
>
> 1. Presentation of candidates for appointment as judges […] or members of the prosecutor's office;
> 2. Presentation of candidates for designation to the duties […] of *chef de corps* in the public prosecutor's office;
> 3. Access to the position of judge or member of the public prosecutor's office;
> 4. Training of judges and members of the public prosecutor's office;
> 5. Establishment of general profiles for the designations referred to in 2;
> 6. Issuance of opinions and proposals concerning the general operation and organization of the judicial branch;
> 7. General supervision and promotion of the use of internal monitoring methods;
> 8. To the exclusion of all disciplinary and criminal tribunals:
>   - Acceptance and follow-up of complaints concerning the operation of the judicial branch;
>   - Initiation of inquiries into the operation of the judicial branch […]."

[2] The author does not provide reference to the document he cites for this purpose.

[3] According to the Special Act of 6 January 1989, adopted pursuant to article 142 of the Constitution, the Court of Arbitration rules on:

1. The conflicts described in article 141;

2. The violation through a law, a decree or a rule as described in article 134, of articles 10 (principle of equality), 11 (principle of non-discrimination) or 24;

3. The violation through a law, a decree or a rule as described in article 134, of articles of the Constitution determined by law. Cases may be brought before the Court by any authority designated by law, any person with a legitimate interest or, for a preliminary ruling, by any court.

[4] Court of Arbitration, 23 May 1990, *R.W.* 1990-1991, 75.

[5] *Bozano v. France* ruling of 18 December 1986, series A, No. 111, p. 18.

[6] The Council of State found that the initial text of the Act provided that each college of the High Council which should be composed of 11 justices and 11 non-justices, should have no fewer than 8 members of each sex. In appointing the 11 non-justices, the Senate was therefore required to ensure some degree of balance between men and women, the consequence of which might have been a gender imbalance among non-justices. The Council of State noted in this regard: "No reasonable justification seems possible for an imbalance (…)." The bill was adapted in response to these observations by the Council of State. During the *travaux préparatoires*, the following statement was made: "As regards the balance between men and women within the High Council, the Prime Minister stressed that in the first analysis it was important to respect the votes cast. In accordance with the present solution, it devolved on the Senate to ensure gender balance in the appointment of non-justices, and on that basis to ensure that the required quorum (no fewer than eight members of each sex) was attained.

This obligation of correction on the part of the Senate could be done away with […]. [As regards the candidates for justice positions] the Prime Minister proposed that […] each voter should cast three votes, at least one of which would be for a candidate for the seat and at least one for a candidate of the public prosecutor's office; he would prohibit voting for three candidates of the same sex.

A similar solution would ensure a sufficient number of elected candidates of each sex (between one and two thirds [for candidates for justice positions])" (Parl. Doc. 1997-98, 1677/8).

[7] Article 295 bis-2, paragraph 4, of the Judicial Code.

[8] General comment No. 28, on article 3 of the Covenant (sixty-eighth session, 2000), para. 29.

[9] "Since the High Council also serves as an advisory body, each college shall comprise eight members of each sex." Bill of 15 July 1998, Discussion, p. 44, Belgian Chamber of Representatives. See also para. 6.3 of the present communication.

[10] "A study of the actual situation reveals that, in the majority of the advisory bodies, the membership includes a very small number of women." Preamble to the Bill, p. 1, 27 March 1990, Chamber of Representatives, parliamentary documents; "A survey of the national consultative bodies shows that the proportion of women is no more than 10 per cent." Introduction to the Bill by the Secretary of State for Social Emancipation, p. 1, 3 July 1990, Belgian Senate.

APPENDIX

Individual opinion of Committee member Ms. Ruth Wedgwood (concurring)

The Committee has concluded that the norms of non-discriminatory access to public service and political office embodied in article 25 of the Covenant do not preclude Belgium from requiring the inclusion of at least four members of each gender on its High Council of Justice. The Council is a body of some significant powers, recommending candidates for appointment as judges and prosecutors, as well as issuing opinions and investigating complaints concerning the operation of the judicial branch. However, it is pertinent to note that the membership of the Council of Justice is highly structured by many other criteria as well, under the Belgium Judicial Code. The Council is comprised of two separate "colleges" for French-speaking and Dutch-speaking members. Within each college of 22 members, half are directly elected by sitting judges and prosecutors. The other "non-justice" members are chosen by the Belgium Senate, and the slate must include a minimum number of experienced lawyers, college or university teachers, and other professionals, with "no fewer than four members of each sex" included among the 11 members of these "non-justice" groups. This electoral rule may benefit men as well as women, although it was rather clearly intended to assure the participation of women on this "advisory" body. It is important to note that the constitution or laws of some States parties to the Covenant may disdain or forbid any use of set-asides or minimum numbers for participation in governmental bodies, and nothing in the instant decision interferes with that national choice. The Committee only decides that Belgium is free to choose a different method in seeking to assure the fair participation of women as well as men in the processes of government.

(*Signed*): Ruth Wedgwood

[Adopted in English, French and Spanish, the English text being the original version. Subsequently to be issued also in Arabic, Chinese and Russian as part of the present report.]

T. Communication No. 962/2001, *Mulezi v. Democratic Republic of the Congo* (Views adopted on 6 July 2004, eighty-first session)*

Submitted by:	Marcel Mulezi (not represented by counsel)
Alleged victims:	The author and his wife
State party:	Democratic Republic of the Congo
Date of communication:	6 May 2000 (initial submission)

The Human Rights Committee, established under article 28 of the International Covenant on Civil and Political Rights,

Meeting on 8 July 2004,

Having concluded its consideration of communication No. 962/2001 submitted to the Committee on behalf of Mr. Marcel Mulezi and his wife under the Optional Protocol to the International Covenant on Civil and Political Rights,

Having taken into account all written information made available to it by the author of the communication and the State party,

Adopts the following:

Views under article 5, paragraph 4, of the Optional Protocol

1. The author of the communication is Marcel Mulezi, a national of the Democratic Republic of the Congo resident in Geneva. The author claims that he and his wife are victims of violations by the Democratic Republic of the Congo of articles 6, paragraph 1; 7; 9, paragraphs 1, 2, 4 and 5; 10, paragraph 1; 14, paragraph 3; and 15, paragraph 1, of the International Covenant on Civil and Political Rights. He is not represented by counsel.

The facts as submitted by the author

2.1 In July 1997, under pressure from one Commander Mortos (commander of the Gemena Infantry Battalion in the north-west area of the Democratic Republic of the Congo), the author, a businessman specializing in coffee and transport, lent the army one of his trucks. The vehicle was not returned and the author decided never again to agree to the military authorities' requests.

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* The following members of the Committee participated in the examination of the present communication: Mr. Abdelfattah Amor, Mr. Prafullachandra Natwarlal Bhagwati, Mr. Franco Depasquale, Mr. Maurice Glèlè Ahanhanzo, Mr. Walter Kälin, Mr. Ahmed Tawfik Khalil, Mr. Rajsoomer Lallah, Mr. Rafael Rivas Posada, Sir Nigel Rodley, Mr. Martin Scheinin, Mr. Ivan Shearer, Mr. Hipólito Solari Yrigoyen, Ms. Ruth Wedgwood and Mr. Roman Wieruszewski.

2.2 At around 5 a.m. on 27 December 1997, members of a military intelligence service of the Congolese Armed Forces - known as "Détection Militaire des Activités Antipatrie" or DEMIAP associated with the regime of Congolese President Laurent Désiré Kabila - called on the author at his home to tell him that his services were required by Commander Mortos. The author was taken to the Gemena military camp, where he was immediately placed in detention. At 9 a.m. he was subjected to an interrogation directed by Commander Mortos concerning his alleged collaboration with the former President of the Congo, General Joseph Désiré Mobutu, and his associates.

2.3 At around 9.30 a.m., the author was confronted with one of his employees, known as Mario, who, the author claims, had been tortured (a broken jaw and other injuries prevented him from speaking or even standing upright) and forced, during his interrogation, to accuse Mr. Mulezi of collusion with Mobutu's faction.

2.4 When he contested these accusations, the author was brutally beaten up by at least six soldiers. In addition to injuries to the nose and mouth, his fingers were broken. He was tortured again the following day, when he was tied up and beaten all over his body until he lost consciousness. In the course of some two weeks of detention in Gemena, the author was tortured four or five times every day: hung upside down; lacerated; the nail of his right forefinger pulled out with pincers; cigarette burns; both legs broken by blows to the knees and ankles with metal tubing; two fingers broken by blows with rifle butts. Despite his condition, and in particular his loss of mobility, he was not allowed to see a doctor. Like his fellow detainees, the author was unable to leave his cell even for a shower or a walk. He states that he was in a cell measuring 3 metres by 3, which he shared at first with 8 and, eventually, 15 other detainees. Furthermore, since he was being held incommunicado, he was not getting enough food, unlike the other prisoners, who were brought food by their families.

2.5 After about two weeks, the author was transferred by air to the Mbandaka military camp, where he was held for 16 months. Again, he was unable to see a doctor, despite his physical condition, notably loss of mobility. He was never informed of any charge against him; he was never brought before a judge; and he was not allowed access to a lawyer. He states that he was held with 20 others in a cockroach-ridden cell measuring roughly 5 metres by 3, with no sanitation, no windows and no mattresses. His food rations consisted of manioc leaves or stalks. Two showers a week were permitted and the soldiers occasionally put the author out in the yard as he could not move by himself. The author states that he eventually obtained some medicines when Médecins sans Frontières (Doctors without Borders) visited the camp.

2.6 In late December 1998, the author's brother-in-law, Mr. Mungala, managed to locate Mr. Mulezi through an army acquaintance, and paid him a brief visit. It was then that the author learned that, the day after his arrest, soldiers had searched his house and beaten up his wife. Commander Mortos had refused Mrs. Mulezi's request to travel to the city of Bangui in the Central African Republic in order to receive medical attention, and she died three days later.

2.7 On 11 February 1999, when seeing what an appalling condition the author was in, a soldier took him to hospital on his own initiative, but the military police intervened, producing a summons from the Military Tribunal. In actual fact the author was immediately put back in detention in the military camp without being brought before a judge; the soldier who had helped him was given a month's imprisonment.

2.8 On 25 May 1999, the author bribed some soldiers to take him to the harbour next to the military camp, and a boat owner agreed to help him to leave Mbandaka. The author then managed to escape from Africa to Switzerland. According to a medical certificate from the Geneva University Hospital, the author was hospitalized as soon as he arrived in Switzerland in December 1999, for physical and psychological sequelae of the violence he had been subjected to in his country of origin. After intensive medical care, the author has recovered partial mobility, but he requires further treatment if he is to regain his independence to any satisfactory degree.

The complaint

3.1 The author claims that he and his wife are the victims of violations by the Democratic Republic of the Congo of articles 6, paragraph 1; 7; 9, paragraphs 1, 2, 4 and 5; 10, paragraph 1; 14, paragraph 3; and 15, paragraph 1, of the International Covenant on Civil and Political Rights.

3.2 On the question of the exhaustion of domestic remedies, the author claims that such remedies were inaccessible and ineffective, insofar as (a) he was unable to apply to a court while he was arbitrarily detained and (b) he is alive only because he managed to escape from the Mbandaka military camp and flee to Switzerland.

3.3 Despite the request and reminders sent by the Committee to the State party asking for a reply to the author's allegations (notes verbales of 8 January 2001, 17 October 2001 and 28 October 2003), the Committee has received no response.

Committee's decision on admissibility

4.1 Before considering any claims contained in a communication, the Human Rights Committee must, in accordance with rule 87 of its rules of procedure, decide whether or not the communication is admissible under the Optional Protocol to the Covenant.

4.2 In accordance with article 5, paragraph 2 (a), of the Optional Protocol, the Committee has ascertained that the same question is not being examined under another procedure of international investigation or settlement.

4.3 In the light of the author's arguments concerning the exhaustion of domestic remedies and the complete lack of cooperation from the State party, the Committee considers that the provisions of article 5, paragraph 2 (b), of the Optional Protocol are not an impediment to examination of the communication.

4.4 The Committee considers that the author's complaint that the facts as submitted constitute a violation of articles 14, paragraph 3; and 15, paragraph 1, of the Covenant has not been sufficiently substantiated for the purposes of admissibility. This part of the communication is therefore inadmissible under article 2 of the Optional Protocol.

4.5 The Committee considers that, in the absence of any information from the State party, the complaints submitted by the author may raise issues under articles 6, paragraph 1; 7; 9, paragraphs 1, 2, 4 and 5; 10, paragraph 1; and 23, paragraph 1, and should therefore be examined as to the merits.

Examination of the merits

5.1 The Human Rights Committee has considered the present communication in the light of all the information made available to it by the parties, as required under article 5, paragraph 1, of the Optional Protocol. It notes that the State party has not, despite the reminders sent to it, provided any replies on either the admissibility or the merits of the communication. The Committee notes that, under article 4, paragraph 2, of the Optional Protocol, a State party is under an obligation to cooperate by submitting to it written explanations or statements clarifying the matter and indicating the measures, if any, that may have been taken to remedy the situation. As the State party has failed to cooperate in that regard, the Committee had no choice but to give the author's allegations their full weight insofar as they have been substantiated.

5.2 With regard to the complaint of a violation of article 9, paragraphs 1, 2 and 4, of the Covenant, the Committee notes the author's statement that no warrant was issued for his arrest and that he was taken to the Gemena military camp under false pretences. Mr. Mulezi also maintains that he was arbitrarily detained without charge from 27 December 1997 onwards, first at Gemena, for two weeks, and then at the Mbandaka military camp, for 16 months. It is clear from the author's statements that he was unable to appeal to a court for a prompt determination of the lawfulness of his detention. The Committee considers that these statements, which the State party has not contested and which the author has sufficiently substantiated, warrant the finding that there has been a violation of article 9, paragraphs 1, 2 and 4, of the Covenant. On the same basis, the Committee concludes, however, that there has been no violation of article 9, paragraph 5, as it does not appear that the author has in fact claimed compensation for unlawful arrest or detention.

5.3 As to the complaint of a violation of articles 7 and 10, paragraph 1, of the Covenant, the Committee notes that the author has given a detailed account of the treatment he was subjected to during his detention, including acts of torture or ill-treatment and, subsequently, the deliberate denial of proper medical attention despite his loss of mobility. Indeed, he has provided a medical certificate attesting to the sequelae of such treatment. Under the circumstances, and in the absence of any counter-argument from the State party, the Committee finds that the author was a victim of multiple violations of article 7 of the Covenant, prohibiting torture and cruel, inhuman and degrading treatment. The Committee considers that the conditions of detention described in detail by the author also constitute a violation of article 10, paragraph 1, of the Covenant.

5.4 With regard to alleged violations of articles 6, paragraph 1, and 23, paragraph 1, of the Covenant, the Committee notes the author's statement that his wife was beaten by soldiers, that Commander Mortos refused her request to travel to Bangui to receive medical attention, and that she died three days later. The Committee considers that these statements, which the State party has not contested although it had the opportunity to do so, and which the author has sufficiently substantiated, warrant the finding that there have been violations of articles 6, paragraph 1, and 23, paragraph 1, of the Covenant as to the author and his wife.

6. The Human Rights Committee, acting under article 5, paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights, is of the view that the facts before it reveal violations by the Democratic Republic of the Congo of articles 6, paragraph 1; 7; 9, paragraphs 1, 2 and 4; 10, paragraph 1; and 23, paragraph 1, of the Covenant.

7. Under article 2, paragraph 3 (a), of the Covenant, the State party has an obligation to ensure that the author has an effective remedy available. The Committee therefore urges the State party (a) to conduct a thorough investigation of the unlawful arrest, detention and mistreatment of the author and the killing of his wife; (b) to bring to justice those responsible for these violations; and (c) to grant Mr. Mulezi appropriate compensation for the violations. The State party is also under an obligation to take effective measures to ensure that similar violations do not occur in future.

8. The Committee recalls that, by becoming a State party to the Optional Protocol, the Democratic Republic of the Congo recognized the competence of the Committee to determine whether there has been a violation of the Covenant or not and that, under article 2 of the Covenant, the State party has undertaken to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the Covenant and to provide an effective and enforceable remedy in the event that a violation is established. Consequently, the Committee wishes to receive from the State party, within 90 days of the transmission of these findings, information about the measures taken to give effect to its views. The State party is also requested to make these findings public.

[Adopted in English, French and Spanish, the French text being the original version. Subsequently to be issued also in Arabic, Chinese and Russian as part of the present report.]

U. Communication No. 964/2001, *Saidov v. Tajikistan* (Views adopted on 8 July 2004, eighty-first session)[*]

Submitted by: Mrs. Barno Saidova (not represented by counsel)

Alleged victim: The author's husband, Mr. Gaibullodzhon Ilyasovich Saidov, deceased

State party: Tajikistan

Date of communication: 11 January 2001 (initial submission)

The Human Rights Committee, established under article 28 of the International Covenant on Civil and Political Rights,

Meeting on 8 July 2004,

Having concluded its consideration of communication No. 964/2001, submitted to the Human Rights Committee by Mrs. Barno Saidova under the Optional Protocol to the International Covenant on Civil and Political Rights,

Having taken into account all written information made available to it by the author of the communication,

Adopts the following:

Views under article 5, paragraph 4, of the Optional Protocol

1.1 The author of the communication is Mrs. Barno Saidova, a Tajik national born in 1958. She submits the communication on behalf of her husband - Gaibullodzhon Saidov, also a Tajik national, born in 1954 and who, at the time of submission of the communication was detained on death row and awaited execution after being sentenced to death by the Military Chamber of the Supreme Court of Tajikistan on 24 December 1999. She claims that her husband is a victim of violations by Tajikistan of articles 6, paragraphs 1 and 2; 7; 9, paragraph 2; 10, paragraph 1; and 14, paragraphs 1, 2, 3 (b), (d), and (g), and 5, of the International Covenant on Civil and Political Rights.[1] The author is not represented by counsel.

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[*] The following members of the Committee participated in the examination of the present communication: Mr. Abdelfattah Amor, Mr. Prafullachandra Natwarlal Bhagwati, Mr. Franco Depasquale, Mr. Maurice Glèlè Ahanhanzo, Mr. Walter Kälin, Mr. Ahmed Tawfik Khalil, Mr. Rajsoomer Lallah, Mr. Rafael Rivas Posada, Sir Nigel Rodley, Mr. Martin Scheinin, Mr. Ivan Shearer, Mr. Hipólito Solari Yrigoyen, Ms. Ruth Wedgwood and Mr. Roman Wieruszewski.

1.2 On 12 January 2001, in accordance with rule 86 of its rules of procedure, the Human Rights Committee, acting through its Special Rapporteur on new communications, requested the State party not to carry out the death sentence against Mr. Saidov while his case was pending before the Committee. No reply was received from the State party in this regard. From the author's subsequent submissions, it transpired that Mr. Saidov was executed on 4 April 2001.

The facts as presented by the author

2.1 According to the author, on 4 November 1998, approximately 600 armed combatants who were based in Uzbekistan but of Tajik origin supported one Colonel Khudoberdiev and infiltrated the Leninabad region in Tajikistan. After occupying several official buildings in the area, they requested an amnesty for all of Khudoberdiev's collaborators, and their safe return in Tajikistan.

2.2 The same day, Mr. Saidov, who lived in Khukhandzh, in the invaded region and was a driver, became acquainted with some of the combatants. He decided to drive several injured combatants to the hospital and to bury victims of the fighting between the followers of Kudoberdiev and governmental troops. Mr. Saidov was armed.

2.3 On 7 November 1998, the combatants began to retreat towards Uzbekistan. Mr. Saidov went to the Kyrgyz border, where he was arrested by the Tajik authorities on 25 November 1998. According to the author, her husband, along with other individuals arrested in the so-called "November events", was beaten to make him confess. The author was allowed to see her husband in the police station one week after his arrest. During her visit, she noted that he had been beaten and that his body bore black and blue bruises. He had a bruise on top of his right eyebrow, on his thorax, his legs were swollen, and he was unable to stand; during one month he secreted blood, because of internal injuries. Allegedly, no medical doctor visited him. The author contends that her husband was threatened that his wife and daughter would suffer if he refused to confess guilt. Another individual arrested in the same context was allegedly shot in the foot, to make him confess.

2.4 According to the author, during the month following the arrest, the national television constantly broadcast press conferences featuring those who had "repented" after their arrest, who bore signs of beatings. Her husband was also shown, and the scar on his right eyebrow was visible. According to the author, Mr. Saidov's general health status deteriorated as a consequence of the beatings, in particular his eyesight.

2.5 Although Mr. Saidov's arrest took place on 25 November 1998, he was officially charged only on 1 January 1999. He was not informed of his right to legal representation upon arrest. The author was the only family member who was allowed to see him a few times. Her husband's lawyer was not chosen by the victim but was assigned to him by an investigator and appeared only in about mid-March 1999. According to the author, he only met once with Mr. Saidov, during the investigation.

2.6 The trial started in June 1999. The Military Chamber of the Supreme Court, sitting in Military Unit 3501 in Khudzhand. The hearing took place in a meeting room with broken windows. No mention of the secret nature of the trial or of any limitation for the public appears in the court's decision, according to the author, but a list was prepared and only one family member per accused was admitted into the courtroom.

2.7 The victim's lawyer was often absent during the trial and many of Mr. Saidov's interrogations took place in his absence; the lawyer was also absent when the judgement was delivered.

2.8 According to the author, all of the accused, including her husband, declared in court that during the investigation they were beaten and threatened to force them to confess or to testify against themselves or against each other. However, the Court ignored these declarations and did not proceed to verify them. According to the author, the presiding judge had decided to convict the accused by the time of the opening of the trial; for that reason, he allegedly conducted the trial in an "accusatory manner".

2.9 The author claims that her husband was detained in the Khudzhand District Police building from 25 November 1998 to 12 January 1999, although an arrested person was supposed to be kept there only for a maximum period of three days. On 12 January 1999, Mr. Saidov was transferred to the investigation centre No. 1 in Khudzhand and placed in a collective cell with 16 other detainees; the air circulation was insufficient and the cell was overcrowded. The food consisted exclusively of barley gruel; as her husband suffered from viral hepatitis before his arrest, he could not digest the food provided in the detention centre and he required a special diet, but was unable to obtain one. As a result, her husband's stomach was injured and he was obliged to consume only the food transmitted infrequently by his family.

2.10 On 24 December 1999, the Supreme Court found Mr. Saidov guilty of banditism; participation in a criminal organization; usurpation of power with use of violence; public call for forced modification of the constitutional order; illegal acquisition and storing of fire guns and munitions, terrorism and murder, and sentenced him to death. The same day, he was transferred to death row, and placed in an individual cell measuring 1 by 2 metres, with a concrete floor with no bed but a thin mattress. The toilet consisted of a bucket in one of the corners. According to the author, her husband, a practising Muslim, was humiliated to have to pray in such conditions. On 25 June 2000, Mr. Saidov was transferred to Detention Centre SIZO No. 1 in Dushanbe, where, allegedly, conditions of detention and quality of food were identical. The author claims that her husband received only every fourth parcel she sent to him through the penitentiary authorities.

2.11 The author states that she and Mr. Saidov's lawyer appealed the Supreme Court decision to the President of the Supreme Court of Tajikistan. The Deputy President of the Supreme Court (and Chairman of the Military Chamber of the same Court) dismissed the appeal on an unspecified date. The mother of Mr. Saidov addressed a request for pardon to the President but received no reply. Mr. Saidov's lawyer introduced a request for pardon to the presidency's Committee for the Defense of the Citizen's Constitutional Rights, but did not receive a reply either.

2.12 On 10 May 2001, the author informed the Committee that her husband was executed on 4 April 2001, despite the Committee's request for interim measures of protection. On 12 June 2001, she submitted a copy of the death certificate, issued on 18 May 2001, which confirmed that Mr. Saidov passed away on 4 April 2001, without mentioning the cause of death.

The claim

3.1 The author claims that her husband was a victim of violations of his rights under article 7 of the Covenant, as during the investigation, in particular during the two weeks following his arrest, he was tortured by the investigators in order to make him confess, in violation of article 14, paragraph 3 (g). When, in court, he and other accused challenged the voluntary character of the confessions they made during the investigation, the judge allegedly cut them short, stating that they were inventing things and asking them to "tell the truth".

3.2 The author claims that article 9, paragraph 2, was violated in her husband's case, as he was arrested on 25 November 1998 but only officially charged one month later, on 1 January 1999.

3.3 Article 10, paragraph 1, of the Covenant is said to have been violated due to the inhuman conditions of detention of Mr. Saidov in Khudzhand and Dushanbe.

3.4 Article 14, paragraph 1, is said to have been violated, because the judge of the Military Chamber of the Supreme Court conducted the trial in a biased manner and imposed limitations on the access of relatives of the accused to the hearing, as well as denying access to other individuals wishing to assist, thus violating the requirement of publicity of the trial. Although not directly invoked by the author, another issue possibly arises under the above provision, in that Mr. Saidov, a civilian, was sentenced by the Military Chamber of the Supreme Court.

3.5 Mr. Saidov's presumption of innocence, protected by article 14, paragraph 2, is also said to have been violated, because during the investigation, State directed national media constantly broadcast and published material, calling him and his co-accused "criminals", "mutineers", etc., thus contributing to a negative public opinion. Later, during the trial, this resulted in the judge's accusatory approach.

3.6 Article 14, paragraph 3 (b) is said to have been violated, because during the investigation, Mr. Saidov was deprived, de facto, of his right to legal representation, in spite of the fact that he risked a capital verdict. A lawyer was assigned by investigators only during the final stages of the investigation and Mr. Saidov met him only once, allegedly in violation of his right to prepare his defence. The author also claims that article 14, paragraph 3 (d) has been violated, as her husband was not informed of his right to be represented by a lawyer from the moment of his arrest. Finally, during the trial, Mr. Saidov's lawyer was frequently absent.

3.7 Mr. Saidov was tried and found guilty by the Military Chamber of the Supreme Court, whose judgements are not subject to ordinary appeal, in violation of article 14, paragraph 5, of the Covenant. The only possible appeal is an extraordinary one and depends on the discretionary power of the President of the Supreme Court (or his deputies), or the Prosecutor General (or his deputies). The author considers that this system deprived her husband of his right of appeal, in violation of the principles of equality of arms and adversary proceedings, by giving an unfair advantage to the prosecutor's side. The author adds that even if an extraordinary appeal was to be submitted and takes place, it is always conducted without hearing and would only cover matters of law, contrary to the Committee's jurisprudence.[2]

3.8 The author contends that the above violations led to a violation of her husband's rights under article 6, paragraphs 1 and 2, as he was sentenced to death after an unfair trial, on the ground of a confession extracted under torture.

3.9 In spite of several reminders addressed to the State party with requests to present its observations on the author's submission[3] and with requests for clarification of Mr. Saidov's situation, no reply has been received.

State party's failure to respect the Committee's request for interim measures under rule 86

4.1 The author has alleged that the State party breached its obligations under the Optional Protocol by executing her husband despite the fact that a communication had been registered before the Human Rights Committee under the Optional Protocol and a request for interim measures of protection had been addressed to the State party in this respect. The Committee recalls[4] that by adhering to the Optional Protocol, a State party to the Covenant recognizes the competence of the Committee to receive and consider communications from individuals claiming to be victims of violations of any of the rights set forth in the Covenant (Preamble and article 1). Implicit in a State's adherence to the Protocol is an undertaking to cooperate with the Committee in good faith so as to permit and enable it to consider such communications, and after examination to forward its views to the State party and to the individual (art. 5 (1), (4)). It is incompatible with these obligations for a State party to take any action that would prevent or frustrate the Committee in its consideration and examination of the communication, and in the expression of its Views.

4.2 Apart from any violation of the Covenant found against a State party in a communication, a State party commits grave breaches of its obligations under the Optional Protocol if it acts to prevent or frustrate consideration by the Committee of a communication alleging a violation of the Covenant, or to render examination by the Committee moot and the expression of its Views nugatory and futile. In the present communication, the author alleges that her husband was denied rights under articles 6, 7, 9, 10 and 14 of the Covenant. Having been notified of the communication, the State party has breached its obligations under the Protocol, by executing the alleged victim before the Committee concluded its consideration and examination and the formulation and communication of its Views. It is particularly inexcusable for the State to have done so after the Committee has acted under rule 86 of its rules of procedure, requesting that the State party refrains from doing so.

4.3 The Committee also expresses great concern about the lack of the State party's explanation for its action, in spite of several requests made in this relation by the Committee, acting through its Chairman and its Special Rapporteur on new communications.

4.4 The Committee recalls that interim measures pursuant to rule 86 of the Committee's rules of procedure adopted in conformity with article 39 of the Covenant, are essential to the Committee's role under the Protocol. Flouting of the rule, especially by irreversible measures such as, as in the present case, the execution of the author's husband undermines the protection of Covenant rights through the Optional Protocol.

Issues and proceedings before the Committee

Committee's decision on admissibility

5.1 Before considering any claim contained in a communication, the Human Rights Committee must, in accordance with rule 87 of its rules of procedure, decide whether or not the communication is admissible under the Optional Protocol to the Covenant.

5.2 The Committee notes that the same matter is not being examined under any other international procedure of investigation and settlement, and that available domestic remedies have been exhausted on the strength of the material before it. In the absence of any State party's objection in this regard, it considers that the conditions set forth in paragraph 2 (a) and (b) of article 5 of the Optional Protocol are satisfied.

5.3 The Committee has noted the author's claims under articles 6, 7, 9, 10, and 14, set out above, and has noted that the author's allegations in relation to the initial stages of Mr. Saidov's investigation relate to a period prior to the entry into force of the Optional Protocol for the State party. The author's case, however, was examined by a court, in first instance, only on 24 December 1999 - i.e. after the entry into force of the Optional Protocol for Tajikistan. In the circumstances, the Committee finds that the alleged violations of the Covenant had or continued to have effects that in themselves constituted possible violations after the entry into force of the Optional Protocol and are therefore admissible, except the allegations under article 9, which do not fall into that category, and therefore are inadmissible under article 1 of the Optional Protocol.

Examination of the merits

6.1 The Human Rights Committee has considered the present communication in the light of all the information made available to it by the parties, as required under article 5, paragraph 1, of the Optional Protocol. It notes that the State party has not, despite the reminders sent to it, provided any replies on either the admissibility or the merits of the communication. The Committee notes that, under article 4, paragraph 2, of the Optional Protocol, a State party is under an obligation to cooperate by submitting to it written explanations or statements clarifying the matter and indicating the measures, if any, that may have been taken to remedy the situation. As the State party has failed to cooperate in that regard, the Committee had no choice but to give the author's allegations their full weight insofar as they have been substantiated.

6.2 With regard to the claim that the author's husband was tortured and threatened following his arrest to make him confess, the Committee notes that the author has provided the names of the officials who beat her husband, using batons and kicks, and has described in some detail her husband's resulting injuries. From the documents submitted by the author, it transpires that these allegations were presented to the President of the Supreme Court on 7 April 2000, and that he responded that the allegations had already been examined by the Military Chamber of the Supreme Court and were found to be groundless. The author argues that her husband and his co-accused revoked their initial confessions in court, having been extracted under torture; this challenge to the voluntariness of the confessions was dismissed by the judge. The Committee notes that the State party has failed to indicate how the court investigated these allegations, nor has it provided copies of any medical reports in this respect. In the circumstances, due weight must be given to the author's claim, and the Committee considers that the facts as submitted disclose a violation of article 7 of the Covenant.

6.3 In the light of the above finding and of the fact that Mr. Saidov's conviction was based on his confession obtained under duress, the Committee concludes that article 14, paragraph 3 (g), of the Covenant, was also violated.

6.4 The Committee has taken note of the author's claims under article 10, paragraph 1, of the Covenant, relating to her husband's detention subsequent to the entry into force of the Optional Protocol during the investigation and on death row, due to the lack of medical assistance and the poor conditions of detention as exposed in paragraphs 2.9 and 2.10 above. In the absence of any State party's refutation, once again, due weight must be given to the author's allegations. Accordingly, the Committee concludes that article 10, paragraph 1, has been violated with Mr. Saidov's respect.

6.5 The Committee has noted that the author's husband was unable to appeal his conviction and sentence by way of an ordinary appeal, because the law provides that a review of judgements of the Military Chamber of the Supreme Court is at the discretion of a limited number of high-level judicial officers. Such review, if granted, takes place without a hearing and is allowed on questions of law only. The Committee recalls that even if a system of appeal may not be automatic, the right to appeal under article 14, paragraph 5, imposes on the State party a duty substantially to review, both on the basis of sufficiency of the evidence and of the law, the conviction and sentence, as long as the procedure allows for due consideration of the nature of the case.[5] In the absence of any explanation from the State party in this regard, the Committee is of the opinion that the above-mentioned review of judgements of the Military Chamber of the Supreme Court, falls short of the requirements of article 14, paragraph 5, of the Covenant, and, consequently, that there has been a violation of this provision in Mr. Saidov's case.[6]

6.6 The author further claimed that her husband's right to be presumed innocent until proved guilty has been violated, due to the extensive and adverse pre-trial coverage by State-directed media which designated the author and his co-charged as criminals, thereby negatively influencing the subsequent court proceedings. In the absence of information or objection from the State party in this respect, the Committee decides that due weight must be given to the author's allegations, and concludes that Mr. Saidov's rights under article 14, paragraph 2, have been violated.

6.7 The Committee has noted the author's claim that her husband's right to a fair trial was violated, inter alia by the fact that the judge conducted the trial in a biased manner and refused even to consider the revocation of the confessions made by Mr. Saidov during the investigation. No explanation was provided by the State party for the reasons of that situation. Therefore, on the basis of the strength of the material before it, the Committee concludes that the facts as submitted before it reveal a violation of Mr. Saidov's rights under article 14, paragraph 1, of the Covenant.

6.8 As to the alleged violation of article 14, paragraph 3 (b), in that the author's husband was legally represented only towards the end of the investigation and not by counsel of his own choice, with no opportunity to consult his representative, and that, contrary to article 14, paragraph 3 (d), Mr. Saidov was not informed of his right to be represented by a lawyer upon arrest, and that his lawyer was frequently absent during the trial, the Committee once more regrets the absence of a relevant State party explanation. It recalls its jurisprudence that, particularly in cases involving capital punishment, it is axiomatic that the accused must be effectively assisted by a lawyer[7] at all stages of the proceedings. In the present case, the author's husband faced several charges which carried the death penalty, without any effective legal defence, although a lawyer had been assigned to him by the investigator. It remains unclear from the material before the Committee whether the author or her husband have requested a private lawyer, or have contested the choice of the assigned lawyer. However, and in the absence of any relevant State party explanation on this issue, the Committee reiterates that while article 14, paragraph 3 (d) does not entitle an accused to choose counsel free of charge, steps must be taken to ensure that counsel, once assigned, provides effective representation in the interest of justice.[8] Accordingly, the Committee is of the view that the facts before it reveal a violation of Mr. Saidov's rights under article 14, paragraph 3 (b) and (d), of the Covenant.

6.9 The Committee recalls[9] that the imposition of a sentence of death upon conclusion of a trial in which the provisions of the Covenant have not been respected constitutes a violation of article 6 of the Covenant. In the current case, the sentence of death was passed, and subsequently carried out, in violation of the right to a fair trial as set out in article 14 of the Covenant, and therefore also in violation of article 6 of the Covenant.

7. The Human Rights Committee, acting under article 5, paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights, is of the view that the facts before it disclose a violation of Mr. Saidov's rights under articles 6, 7, 10, paragraph 1, and 14, paragraphs 1, 2, 3 (b), (d), and (g), and 5, of the Covenant.

8. Under article 2, paragraph 3 (a), of the Covenant, the author is entitled to an effective remedy, including compensation. The State party is under an obligation to take measures to prevent similar violations in the future.

9. Bearing in mind that, by becoming a party to the Optional Protocol, the State party has recognized the competence of the Committee to determine whether there has been a violation of the Covenant or not and that, pursuant to article 2 of the Covenant, the State party has undertaken to ensure to all individuals within its territory or subject to its jurisdiction the rights recognized in the Covenant and to provide an effective and enforceable remedy in case a violation has been established, the Committee wishes to receive from the State party, within 90 days, information about the measures taken to give effect to these Views. The State party is also requested to publish the Committee's Views.

[Adopted in English, French and Spanish, the English text being the original version. Subsequently to be issued also in Arabic, Chinese and Russian as part of the present report.]

Notes

[1] The Optional Protocol entered into force for Tajikistan on 4 April 1999.

[2] The author refers to the Committee's Views in the cases of *Domukovsky et al. v. Georgia*, communications Nos. 623-627/1995, adopted on 6 April 1998.

[3] The initial rule 86 request was addressed to the State party on 12 January 2001. A note verbale was sent to the State party on 18 May 2001, requesting information on Mr. Saidov's situation and reiterating the rule 86 request. A letter signed by the Committee's Chairperson was addressed to the State party on 19 June 2001, with a request for clarification on the non-compliance with the rule 86 request. Finally, on 3 August 2001, a note verbale was addressed to the State party, requesting it to provide information on the case (what steps were taken by the State to comply with the Committee's rule 86 request, on what grounds Mr. Saidov was executed, and what measures are being taken by the State to guarantee compliance with such requests in future. On 5 December 2002, the State party was invited to provide the above requested information.

[4] See *Piandong v. The Philippines*, communication No. 869/1999, Views adopted on 19 October 2000.

[5] See *Reid v. Jamaica*, communication No. 355/1989, para. 14.3, and *Lumley v. Jamaica*, communication No. 662/1995, para. 7.3.

[6] See *Domukovsky et al. v. Georgia*, communications Nos. 623-627/1995.

[7] See for example *Aliev v. Ukraine*, communication No. 781/1997, *Robinson v. Jamaica*, communication No. 223/1987, *Brown v. Jamaica*, communication No. 775/1997.

[8] See, inter alia, *Kelly v. Jamaica*, communication No. 253/1987.

[9] See *Conroy Levy v. Jamaica*, communication No. 719/1996, and *Clarence Marshall v. Jamaica*, communication No. 730/1996, *Kurbanov v. Tajikistan*, communication No. 1096/2002.

V. Communication No. 976/2001, *Derksen v. The Netherlands* (Views adopted on 1 May 2004, eightieth session)*

Submitted by: Cecilia Derksen, on her own behalf and on behalf of her daughter Kaya Marcelle Bakker (represented by counsel, A.W.M. Willems)

Alleged victim: The author

State party: The Netherlands

Date of communication: 11 August 2000 (initial submission)

The Human Rights Committee, established under article 28 of the International Covenant on Civil and Political Rights,

Meeting on 1 April 2004,

Having concluded its consideration of communication No. 976/2001, submitted to the Human Rights Committee on behalf of Cecilia Derksen and her daughter Kaya Marcelle Bakker under the Optional Protocol to the International Covenant on Civil and Political Rights,

Having taken into account all written information made available to it by the author of the communication, and the State party,

Adopts the following:

Views under article 5, paragraph 4, of the Optional Protocol

1. The author of the communication is Cecilia Derksen, a Dutch national. She submits the communication on her own behalf and on behalf of her child Kaya Marcelle Bakker, born on 21 April 1995, and thus 5 years old at the time of the initial submission. She claims that she and her child are the victims of a violation by the Netherlands of article 26 of the International Covenant on Civil and Political Rights. The author is represented by counsel.

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* The following members of the Committee participated in the examination of the present communication: Mr. Nisuke Ando, Mr. Prafullachandra Natwarlal Bhagwati, Ms. Christine Chanet, Mr. Franco Depasquale, Mr. Maurice Glèlè Ahanhanzo, Mr. Walter Kälin, Mr. Ahmed Tawfik Khalil, Mr. Rafael Rivas Posada, Sir Nigel Rodley, Mr. Martin Scheinin, Mr. Ivan Shearer, Mr. Hipólito Solari Yrigoyen, Ms. Ruth Wedgwood, Mr. Roman Wieruszewski and Mr. Maxwell Yalden.

Two separate individual opinions signed by Mr. Nisuke Ando and Sir Nigel Rodley are appended to the present document.

The facts as submitted by the author

2.1 The author shared a household with her partner Marcel Bakker from August 1991 to 22 February 1995. It is stated that Mr. Bakker was the breadwinner, whereas Ms. Derksen took care of the household and had a part-time job. They had signed a cohabitation contract and when Ms. Derksen became pregnant, Mr. Bakker recognized the child as his. The author states that they intended to marry. On 22 February 1995, Mr. Bakker died in an accident.

2.2 On 6 July 1995, the author requested benefits under the General Widows and Orphans Law (AWW, Algemene Weduwen en Wezen Wet). On 1 August 1995, her request was rejected because she had not been married to Mr. Bakker and therefore could not be recognized as widow under the AWW. Under the AWW, benefits for half-orphans were included in the widows' benefits.

2.3 On 1 July 1996, the Surviving Dependants Act (ANW, Algemene Nabestaanden Wet) replaced the AWW. Under the ANW, unmarried partners are also entitled to a benefit. On 26 November 1996 Ms. Derksen applied for a benefit under the ANW. On 9 December 1996, her application was rejected by the Social Insurance Bank (Sociale Verzekeringsbank) on the grounds that "(…) only those who were entitled to a benefit under the AWW on 30 June 1996 and those who became widow on or after 1 July 1996 are entitled to a benefit under the ANW".

2.4 Ms. Derksen's request for revision of the decision was rejected by the Board of the Social Insurance Bank on 6 February 1997. Her further appeal was rejected by the District Court Zutphen (Arrondissementsrechtbank Zutphen) on 28 November 1997. On 10 March 1999, the Central Council of Appeal (Centrale Raad van Beroep) declared her appeal unfounded. With this, all domestic remedies are said to be exhausted.

The complaint

3.1 According to the author, it constitutes a violation of article 26 of the Covenant to distinguish between half-orphans whose parents were married and those whose parents were not married. It is stated that the distinction between children born of married parents and children born of non-married parents cannot be justified on objective and reasonable grounds. With reference to the Human Rights Committee's decision in *Danning v. The Netherlands*, it is argued that the Committee's considerations do not apply in the present case, as the decision not to marry has no influence on the rights and duties in the parent-child relationship.

3.2 The author further points out that under the ANW, half-orphans whose parent died on or after 1 July 1996 do have an entitlement to a benefit, whether the parents were married or not, thereby eliminating the unequal treatment complained of above. According to the author it is unacceptable to maintain the unequal treatment for half-orphans whose parent died before 1 July 1996.

3.3 The author further claims that she herself is also a victim of discrimination. She accepts, on the basis of the Committee's decision in *Danning v. The Netherlands*, the decision not to grant her a benefit under the AWW, since benefits under that law were limited to married partners. However, now that the law has changed and allows benefits for unmarried partners, she cannot accept that she is still being refused a benefit solely on the basis that her partner died before 1 July 1996. The author argues that once it is decided to treat married and unmarried partners equally this should apply to all regardless of the date of the death of the partner and that the failure to do so constitutes a violation of article 26 of the Covenant.

State party's observations

4.1 By submission of 23 November 2001, the State party accepts the facts as described by the author. It adds that the Central Council of Appeal, in rejecting the author's appeal, considered that provisions outlawing discrimination such as article 26 of the Covenant are not designed to offer protection from disadvantages which may be caused by time restraints inherent to amendments of legislation. In the opinion of the Council, when new rights are provided, no obligation exists to extend those rights to cases predating the change.

4.2 The State party explains that when the AWW was replaced by the ANW, the transitional regime was based on respect for prior rights, in the sense that existing rights under the AWW were respected and no new rights could be claimed resulting from a death prior to the entry into force of the ANW.

4.3 Concerning the admissibility of the communication, the State party points out that the author has not appealed the decision of 1 August 1995 by which her application under the AWW was rejected. The State party argues that to the extent that the communication relates to the distinctions made in the AWW, it should be declared inadmissible.

4.4 As to the merits, the State party refers to the Committee's prior jurisprudence in cases concerning social security, and seeks to infer from these decisions that it is for the State to determine what matters it wishes to regulate by law and under what conditions entitlement is granted, as long as the legislation adopted is not discriminatory in nature. From the earlier decisions in which the Committee has reviewed the Dutch social security legislation the State party concludes that the distinction between married and unmarried couples is based on reasonable and objective grounds. The State party recalls that the Committee has based its view on the fact that persons are free to choose whether or not to engage in marriage and accept the responsibilities and rights that go with it.

4.5 The State party rejects the author's opinion that the new legislation should be applied to old cases as well. It points out that the ANW was introduced to reflect the changes in the society where living together as partners otherwise than through marriage has become common. In the State's party's opinion, it is up to the national legislature to judge the need for a transitional regime. The State party emphasizes that those persons who are now entitled to benefits under the ANW are persons with established rights. This distinguishes them from persons who like the author do not have established rights. Before 1 July 1996, marriage was a relevant factor for benefits under the surviving dependants' legislation, and people were free to marry and thereby safeguard entitlement to the benefits, or not to marry and thereby choose to be excluded from such entitlement. The fact that the ANW has now abolished the differential treatment between married and unmarried cohabitating persons does not alter this pre-existing position. The State party concludes that the transitional regime does not constitute discrimination against the author.

4.6 To the extent that the communication relates to Ms. Derksen's daughter, the State party states that its above observations apply mutatis mutandis also to the claim of unequal treatment of half-orphans. The State party explains in this respect that, as was also the case under the old law, it is not the half-orphan herself who is entitled to the benefit but the surviving parent. Since neither the old nor the new legislation grants entitlements to half-orphans, the State party is of the opinion that there can be no question of discrimination within the meaning of article 26 of the Covenant.

4.7 Concerning the claim that the AWW made a prohibited distinction between children born out of wedlock and children born of a marriage, the State party argues first that the author has not exhausted domestic remedies in this respect. It further argues that the claim is groundless, because the status of the child was irrelevant to the determination under the AWW whether or not a surviving spouse was entitled to a benefit as it was the status of the spouse that determined whether or not a benefit would be provided for the half-orphan.

The author's comments

5.1 By letter dated 25 January 2002, the author notes that the main question is whether or not equal cases may be treated differently because of the time factor, i.e. whether equal treatment between married and unmarried cohabitants may be restricted to those cases in which one of the partners died after 1 July 1996. The author remarks that the insurance scheme established by the ANW is a collective national scheme in which all taxpayers participate. The author refers to the history of other schemes (such as old-age pensions, children's benefits) and states that these applied to all eligible residents and not just to those who became eligible only after the date of enactment. The author further argues that social insurance schemes cannot be compared with commercial insurance schemes and claims that profit considerations would deny the special character of social insurance schemes.

5.2 As to the transitional provisions of the ANW, the author points out that originally the law was enacted in order to provide for equality between men and women, and that the equality between married and unmarried partners was only added after debate in Parliament. The reason for the transitional scheme was that the new law established stricter requirements than the old law, but that for reasons of legal security all those who had been eligible under the old law would also be eligible under the new law, whereas the stricter requirements would apply to newly eligible persons. According to the author, the question whether surviving dependants of unmarried persons who had died before 1 July 1996 should be granted benefits was never posed, and there was thus no conscious decision in this respect. The author further argues that through changes in the calculation of benefits and earlier termination of benefits, the ANW was intended to lower the costs, as is borne out by the statistics over the years 1999, 2000 and 2001 which show that less people are entitled to benefits under the ANW than under the old AWW. In the opinion of the author, the extension to "old" cases of unmarried dependants could thus be easily financed. Moreover, the author recalls that like all taxpaying residents she and her partner paid premiums under the AWW.

5.3 The author maintains that the transitional provisions are discriminatory and points out that if her partner had died 17 months later, she and the child would have been entitled to a benefit. They face the same circumstances as dependants whose partner/parent died after 1 July 1996. The unequal treatment of equally situated persons is clearly in violation of article 26 of the Covenant.

5.4 As to the author's daughter, the author notes that she is being treated differently than children whose father was married to their mother or whose father died after 1 July 1996. In the opinion of the author this amounts to prohibited discrimination as the child has no influence on the decision whether her parents marry or not. With reference to the jurisprudence of the European Court on Human Rights, the author argues that differential treatment between children born in and children born out of wedlock is not permissible.

5.5 The author recalls that differential treatment which is not based on objective and reasonable grounds and which does not have a legitimate aim constitutes discrimination. She also recalls that in March 1991 the Government had already introduced legislation abolishing the distinction between married and unmarried dependants, but that this proposal was withdrawn at the time. She argues that she and her daughter should not pay for the slow pace of enactment of these amendments. She submits that unmarried cohabitation has been accepted practice in the Netherlands for years before the law was changed. The author concludes that she and her daughter have been subjected to different treatment for which no objective and reasonable grounds exist, and which has no legitimate aim.

State party's further observations

6.1 By letter of 7 May 2002, the State party states that it does not share the author's view that article 26 of the Covenant envisages that new legislation must be applied to pre-existing cases. The State party refers to its previous observations and concludes that the transitional regime does not constitute discrimination.

6.2 The State party refers to the Committee's decision in the case of *Hoofdman v. The Netherlands* in which the Committee was of the opinion that the distinction between married and unmarried partners under the AWW did not constitute discrimination. The State party submits that different legal regimes applied to married and unmarried couples at the time the author decided to cohabitate with her partner without marrying him and that the decision not to marry entailed legal consequences that were known to the author.

6.3 The State party also argues that the transitional regime cannot be considered discriminatory in itself, as it distinguishes between two different groups: surviving dependants who were entitled to a benefit under the AWW and those who were not. The distinction was made for reasons of legal security in order to guarantee the rights that people had acquired under the old legislation.

6.4 Furthermore, the State party argues that the ANW being a national insurance scheme to which all residents contribute, it obliges the Government to keep the collective costs as low as possible. As to the author's reference to the introduction of other social security schemes, the State party points out that a distinction must be made between the introduction of such a scheme and the alteration of an existing scheme.

6.5 As to the status of half-orphans born outside marriage, the State party reiterates that the status of the child is not relevant to eligibility for benefits, under either the new or the old scheme. It is the surviving parent who cares for the child who is eligible for benefits. Therefore, the status of the parents was and still is the deciding factor. As long as the distinction between married and unmarried cohabitating parents was justified, as it is according to the Committee's Views in *Hoofdman v. The Netherlands*, the ANW cannot be said to perpetuate discriminatory treatment.

Issues and proceedings before the Committee

7.1 Before considering any claims contained in a communication, the Human Rights Committee must, in accordance with rule 87 of its rules of procedure, decide whether or not the communication is admissible under the Optional Protocol to the Covenant.

7.2 The Committee has noted the State party's objections to the admissibility of the communication on the grounds that the author has not exhausted available domestic remedies with regard to the refusal of a benefit under the AWW. The Committee considers that insofar as the communication relates to alleged violations resulting from the decision not to grant her a benefit under the AWW, this part of the communication is inadmissible under article 5, paragraph 2 (a) of the Optional Protocol.

7.3 The Committee has ascertained that the same matter is not being examined under another procedure of international investigation or settlement for purposes of article 5, paragraph 2 (a) of the Optional Protocol.

8. Accordingly, the Committee decides that the communication insofar as it relates to the refusal of benefit under the ANW is admissible and should be considered on its merits.

Consideration of the merits

9.1 The Human Rights Committee has examined the present communication in the light of all the information made available to it by the parties, as provided in article 5, paragraph 1, of the Optional Protocol.

9.2 The first question before the Committee is whether the author of the communication is a victim of a violation of article 26 of the Covenant, because the new legislation which provides for equal benefits to married and unmarried dependants whose partner has died is not applied to cases where the unmarried partner has died before the effective date of the new law. The Committee recalls its jurisprudence concerning earlier claims of discrimination against the Netherlands in relation to social security legislation. The Committee reiterates that not every distinction amounts to prohibited discrimination under the Covenant, as long as it is based on reasonable and objective criteria. The Committee recalls that it has earlier found that a differentiation between married and unmarried couples does not amount to a violation of article 26 of the Covenant, since married and unmarried couples are subject to different legal regimes and the decision whether or not to enter into a legal status by marriage lies entirely with the cohabitating persons. By enacting the new legislation the State party has provided equal treatment to both married and unmarried cohabitants for purposes of surviving dependants' benefits. Taking into account that the past practice of distinguishing between married and unmarried couples did not constitute prohibited discrimination, the Committee is of the opinion that the State party was under no obligation to make the amendment retroactive. The Committee considers that the application of the legislation to new cases only does not constitute a violation of article 26 of the Covenant.

9.3 The second question before the Committee is whether the refusal of benefits for the author's daughter constitutes prohibited discrimination under article 26 of the Covenant. The State party has explained that it is not the status of the child that determines the allowance of benefits, but the status of the surviving parent of the child, and that the benefits are not granted to the child but to the parent. The author, however, has argued that, even if the distinction between married and unmarried couples does not constitute discrimination because different legal regimes apply and the choice lies entirely with the partners whether to marry or not, the decision not to marry cannot affect the parents' obligations towards the child and the child has no influence on the parents' decision. The Committee recalls that article 26 prohibits both direct and indirect discrimination, the latter notion being related to a rule or measure that may be neutral on its face without any intent to discriminate but which nevertheless results in discrimination because of its exclusive or disproportionate adverse effect on a certain category of persons. Yet, a distinction only constitutes prohibited discrimination in the meaning of article 26 of the Covenant if it is not based on objective and reasonable criteria. In the circumstances of the present case, the Committee observes that under the earlier AWW the children's benefits depended on the status of the parents, so that if the parents were unmarried, the children were not eligible for the benefits. However, under the new ANW, benefits are being denied to children born to unmarried parents before 1 July 1996 while granted in respect of similarly situated children born after that date. The Committee considers that the distinction between children born, on the one hand, either in wedlock or after 1 July 1996 out of wedlock, and, on the other hand, out of wedlock prior to 1 July 1996, is not based on reasonable grounds. In making this conclusion the Committee emphasizes that the authorities were well aware of the discriminatory effect of the AWW when they decided to enact the new law aimed at remedying the situation, and that they could have easily terminated the discrimination in respect of children born out of wedlock prior to 1 July 1996 by extending the application of the new law to them. The termination of ongoing discrimination in respect of children who had had no say in whether their parents chose to marry or not, could have taken place with or without retroactive effect. However, as the communication has been declared admissible only in respect of the period after 1 July 1996, the Committee merely addresses the failure of the State party to terminate the discrimination from that day onwards which, in the Committee's view, constitutes a violation of article 26 with regard to Kaya Marcelle Bakker in respect of whom half-orphans' benefits through her mother was denied under the ANW.

10. The Human Rights Committee, acting under article 5, paragraph 4, of the Optional Protocol, is of the view that the facts before it relating to Kaya Marcelle Bakker disclose a violation of article 26 of the International Covenant on Civil and Political Rights.

11. In accordance with article 2, paragraph 3 (a), of the Covenant, the State party is under an obligation to provide half-orphans' benefits in respect of Kaya Marcelle Bakker or an equivalent remedy. The State party is also under an obligation to prevent similar violations.

12. Bearing in mind that, by becoming a party to the Optional Protocol, the State party has recognized the competence of the Committee to determine whether there has been a violation of the Covenant or not and that, pursuant to article 2 of the Covenant, the State party has undertaken to ensure to all individuals within its territory or subject to its jurisdiction the rights recognized in the Covenant and to provide an effective and enforceable remedy in case a violation has been established, the Committee wishes to receive from the State party, within 90 days, information about measures taken to give effect to the Committee's Views. The State party is also requested to publish the Committee's Views.

[Adopted in English, French and Spanish, the English text being the original version. Subsequently to be issued also in Arabic, Chinese and Russian as part of the present report.]

APPENDIX

Individual opinion of Committee member Mr. Nisuke Ando

Unfortunately I cannot share the Committee's conclusion that the ANW violates article 26 of the Covenant in denying half-orphans benefits to unmarried partners before 1 July 1996, while granting the same benefits to children of unmarried partners after that date.

The facts in the present case, as I see them, are the following: On 1 July 1996, the Surviving Dependants Act (ANW) replaced the General Widows and Orphans Law (AWW). Under the new law, unmarried partners are entitled to a benefit, to which only married couples were entitled under the old law. The author applied for the benefit under ANW but was rejected because her partner died on 22 February 1995, 17 months before the new law was enacted, and since the law has no retroactive effect, she is not entitled to apply for the benefit. The author claims that, once it is decided to treat married couples and unmarried partners equally, this should apply to all regardless of the date of the death of their partner and that the failure to do so constitutes a violation of article 26 to the detriment not only of herself but also of her daughter. (3.3, 5.3 and 5.4)

It is unfortunate that the new law affects her as well as her daughter unfavourably in the present case. However, in interpreting and applying article 26, the Human Rights Committee must take into account the following three factors: First, the codification history of the Universal Declaration of Human Rights makes it clear that only those rights contained in the International Covenant on Civil and Political Rights are justiciable and the Optional Protocol is attached to that Covenant, while the rights contained in the International Covenant on Economic, Social and Cultural Rights are not justiciable. Second, while the principle of non-discrimination enshrined in article 26 of the former Covenant may be applicable to any field regulated and protected by public authorities, the latter Covenant obligates its States parties to realize rights contained therein only progressively. Third, the right to social security, the very right at issue in the present case, is provided not in the former Covenant but in the latter Covenant and the latter Covenant has its own provision on non-discriminatory implementation of the rights it contains.

Consequently, the Human Rights Committee needs to be especially prudent in applying its article 26 to cases involving economic and social rights, which States parties to the International Covenant on Economic, Social and Cultural Rights are to realize without discrimination but step-by-step through available means. In my opinion, the State party in the present case is attempting to treat married couples and unmarried partners equally but progressively, thus making the application of ANW not retroactive. To tell the State party that it is violating article 26 unless it treats all married couples and unmarried partners exactly on the same footing at once sounds like telling the State party not to start putting water in an empty cup if it cannot fill the cup all at once!

(*Signed*): Nisuke Ando

[Adopted in English, French and Spanish, the English text being the original version. Subsequently to be issued also in Arabic, Chinese and Russian as part of the present report.]

Individual opinion of Committee member Sir Nigel Rodley (dissenting)

I do not consider that the Committee's finding of a violation in respect of Kaya Marcelle Bakker, the author's daughter (para. 9.3), withstands analysis. To comply with the Committee's interpretation of the Covenant, the State party would have had to make the ANW retroactive. Indeed, it is the very absence of retroactivity that, according to the Committee, constitutes the violation. Since most legislation has the effect of varying people's rights as compared with the situation prior to the adoption of the legislation, the Committee's logic would imply that all legislation granting a new benefit must be retroactive if it is to avoid discriminating against those whose rights fall to be determined under the previous legislation.

Furthermore, I believe the Committee is straining beyond endurance the notion of victim in the present case. Whether under the AWW or the ANW, no person born out of wedlock had or has any independent right to a benefit. The mother, in this case the author, was and is free to dispose of the benefit without being obliged to apply it to her child's welfare. The already vulnerable doctrine of indirect discrimination that the Committee is here applying is being subjected to intolerable pressure in being asked to sustain the Committee's argument. After all, the asserted indirect discrimination between children of mothers who bore them before or after the ANW was adopted does not begin to compare with the direct discrimination between children born within and those born out of wedlock. Yet the Committee refrains from finding that discrimination to be incompatible with the Covenant, simply by deciding that the communication is admissible only in respect of the applicability of the ANW (para. 7.2). (In this connection I also note that, since the Committee's decision on the merits concerns a difference between the ANW and the AWW, then the logic of this is that the inadmissibility decision should have applied to both pieces of legislation; after all, a successful remedy in respect of the AWW would have resolved the apparent discrepancy in the application of the ANW.)

Accordingly, while regretting that the State party could not have arranged to be more generous in its introduction of the ANW to benefit all those families in the position of Ms. Derksen and her daughter, I am unable to find a violation of the Covenant.

(*Signed*): Sir Nigel Rodley

[Adopted in English, French and Spanish, the English text being the original version. Subsequently to be issued also in Arabic, Chinese and Russian as part of the present report.]

W. Communication No. 1002/2001, *Wallman v. Austria* (Views adopted on 1 April 2004, eightieth session)*

Submitted by:	Franz Wallmann et al. (represented by Alexander H.E. Morawa)
Alleged victim:	The authors
State party:	Austria
Date of communication:	2 February 2001 (initial submission)

The Human Rights Committee, established under article 28 of the International Covenant on Civil and Political Rights,

Meeting on 1 April 2004,

Having concluded its consideration of communication No. 1002/2001, submitted to the Human Rights Committee on behalf of Franz Wallmann et al. under the Optional Protocol to the International Covenant on Civil and Political Rights,

Having taken into account all written information made available to it by the author of the communication, and the State party,

Adopts the following:

Views under article 5, paragraph 4, of the Optional Protocol

1. The authors of the communication are Franz Wallmann (first author) and his wife, Rusella Wallmann (second author), both Austrian nationals, as well as the "Hotel zum Hirschen Josef Wallmann" (third author), a limited partnership including a limited liability company, represented by Mr. and Mrs. Wallmann for the purposes of this communication. The authors claim to be a victim of violations by Austria[1] of article 22, paragraph 1, of the Covenant. They are represented by counsel.

The facts as submitted by the authors

2.1 The first author is the director of a hotel in Salzburg, the "Hotel zum Hirschen", a limited partnership (*Kommanditgesellschaft*) acting as the third author. Until December 1999, the first author and Mr. Josef Wallmann were the company's partners, in addition to its general partner, the "Wallmann Gesellschaft mit beschränkter Haftung", a limited liability company (*Gesellschaft mit beschränkter Haftung*). Since December 1999, when the first author and Josef Wallmann left the limited partnership, the second author holds 100 per cent of the shares of both the limited liability company and the limited partnership.

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* The following members of the Committee participated in the examination of the present communication: Mr. Nisuke Ando, Mr. Alfredo Castillero Hoyos, Ms. Christine Chanet, Mr. Franco Depasquale, Mr. Maurice Glèlè Ahanhanzo, Mr. Walter Kälin, Mr. Ahmed Tawfik Khalil, Mr. Rafael Rivas Posada, Sir Nigel Rodley, Mr. Martin Scheinin, Mr. Ivan Shearer, Mr. Hipólito Solari Yrigoyen, Mr. Roman Wieruszewski and Mr. Maxwell Yalden.

2.2 The "Hotel zum Hirschen Josef Wallmann", a limited partnership (*Kommanditgesellschaft*) is a compulsory member of the Salzburg Regional Section of the Austrian Chamber of Commerce (*Landeskammer Salzburg*), as required under section 3, paragraph 2, of the Chamber of Commerce Act (*Handelskammergesetz*). On 26 June 1996, the Regional Chamber requested the limited partnership to pay its annual membership fees (*Grundumlage*) for 1996, in the amount of ATS 10,230.00.[2]

2.3 On 3 July 1996, the first author appealed on behalf of the limited partnership to the Federal Chamber of Commerce (*Wirtschaftskammer Österreich*) claiming a violation of his right to freedom of association protected under the Austrian Constitution (*Bundesverfassungsgesetz*) and the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR). On 9 January 1997, the Federal Chamber of Commerce rejected the appeal.

2.4 The first author lodged a constitutional complaint with the Austrian Constitutional Court (*Verfassungsgerichtshof*), which declared the complaint inadmissible on 28 November 1997, since it had no prospect of success in the light of the Court's jurisprudence regarding compulsory membership in the Chamber of Commerce, and referred the case to the Supreme Administrative Court (*Verwaltungsgerichtshof*) to review the calculation of the annual fees. Accordingly, that tribunal did not address the question of the limited partnership's compulsory membership.

2.5 On 3 July 1998, the first author submitted an application to the European Commission of Human Rights (European Commission), alleging a violation of his rights under articles 6, paragraph 1 (right to a fair trial in the determination of his civil rights and obligations), 10 (freedom of expression), 11 (freedom of association) and 13 (right to an effective remedy) of the European Convention. In a letter dated 10 July 1998, the secretariat of the former European Commission advised the first author of its concerns as to the admissibility of his application, informing him that, according to the Commission's jurisprudence, membership in a chamber of commerce was not covered by the right to freedom of association since chambers of commerce could not be considered associations within the meaning of article 11 ECHR. Moreover, article 6 of the Convention did not apply to domestic proceedings concerning the levy of taxes and fees. His application would therefore have to be declared inadmissible by the Commission. In the absence of any further observations by the author, his application could neither be registered, nor be transmitted to the Commission.

2.6 By letter of 22 July 1998, the first author responded to the secretariat, setting out his arguments in favour of registering his application. On 11 August 1998, the secretariat of the European Commission informed the author that his application had been registered. As a consequence of the entry into force of Protocol No. 11 to the European Convention on 1 November 1998, the author's application was transferred to the European Court of Human Rights. On 31 October 2000, a panel of three judges of the Court declared the application inadmissible under article 35, paragraph 4, of the Convention, noting "that the applicant has been informed of the possible obstacles to its admissibility" and finding that the matters complained of "do not disclose any appearance of a violation of the rights and freedoms set out in the Convention or its Protocols".[3]

2.7 On 13 October 1998 and on 16 December 1999, respectively, the Federal Commerce Chamber dismissed the third author's appeals against decisions of the Salzburg Regional Chamber specifying the limited partnership's annual membership fees for 1998 and 1999. No constitutional complaint was lodged against these dismissals.

The complaint

3.1 The authors claim to be victims of a violation of article 22, paragraph 1, of the Covenant, because the limited partnership's compulsory membership in the Regional Chamber of Commerce, combined with the obligation to pay annual membership fees, effectively denies them their right to freedom of association, including the right to found or join another association for similar commercial purposes.

3.2 The authors submit that the applicability of article 22 to compulsory membership in the Austrian Federal Chamber and Regional Chambers of Commerce has to be determined on the basis of international standards. Their qualification as public law organizations under Austrian legislation does not reflect their true character, since the Chambers: (1) represent the interests of the businesses that make up their membership, rather than the public interest; (2) engage themselves in a broad range of economic, profit-oriented activities; (3) assist their members in establishing business contacts; (4) exercise no disciplinary powers vis-à-vis their members; and (5) lack the characteristics of professional organizations in the public interest, their common feature being limited to "doing business". The authors contend that article 22 of the Covenant is applicable to the Chambers, since they perform the functions of a private organization representing its economic interests.

3.3 The authors argue that even if the Chambers were to be considered public law organizations, the financial burden placed on their members by the annual membership fees effectively prevents members from associating with one another outside the Chambers, since individual business people cannot reasonably be expected to make similar contributions in addition to the Chambers' annual membership fees, to fund alternative private associations to enhance their economic interests. The annual membership fees therefore serve, and are calculated, as a de facto prohibition of the exercise of the right freely to associate outside the Chambers.

3.4 For the authors, the compulsory membership scheme is not a necessary restriction to further any legitimate State interest within the meaning of article 22, paragraph 2, of the Covenant. There is no such compulsory membership in most other European States.

3.5 With regard to the Austrian reservation to article 5, paragraph 2 (a), of the Optional Protocol, the authors argue that, taking the text of the reservation literally, the same matter has not been examined by the "European Commission of Human Rights", as the first author's application to the Commission was dismissed by the European Court of Human Rights without any examination on the merits, in particular as regards the questions of whether the Austrian Chamber of Commerce falls under the definition of "association" and whether its compulsory membership makes it impossible for individuals to exercise their right to freedom of association outside the Chamber. The failure of the European Court's secretariat first to inform the author about the concerns as to the admissibility of his application deprived him of his right to forum selection by withdrawing his application before the European Court and submitting it to the

Committee. The fact that he had already received a letter from the Commission's secretariat in July 1998 is said to be irrelevant, since it pre-dated the registration of his application and because the Court's case law had evolved in the meantime.

The State party's observations on admissibility

4.1 On 26 September 2001, the State party made its submission on the admissibility of the communication. It considers that, insofar as the first author is concerned, the Committee's competence to examine the case is precluded by article 5, paragraph 2 (a), of the Optional Protocol read in conjunction with the relevant Austrian reservation.

4.2 The State party argues that the reservation is applicable to the communication because the first author had already brought the same matter before the European Commission of Human Rights, whose secretariat informed him of its concerns as to the admissibility of his application, concluding that the application would likely be declared inadmissible. Given that the secretariat did not only raise formal issues in the letter to the first author, but referred to several precedents from the Commission's substantive case law, the State party argues that the European Commission proceeded to an examination of the merits of the application and has, therefore, "examined" the same matter.

4.3 In addition, the European Court, in its decision of 31 October 2000, stated that it "had examined the application". The fact that the Court eventually rejected the application as inadmissible is without prejudice to this finding, since it was not dismissed on the formal grounds set out in article 35, paragraphs 1 and 2, of the Convention. Rather, the Court's finding that the matters complained of "do not disclose any appearance of a violation of the rights and freedoms set out in the Convention or its Protocols" clearly shows that the Court's examination also comprised "a far-reaching analysis of the merits of the case". The application was thus rejected on the merits, in accordance with article 35, paragraph 4, of the Convention, as manifestly ill-founded.

4.4 For the State party, the applicability of the reservation is not hampered by its explicit reference to the European Commission of Human Rights. Even though the author's application was eventually rejected by the European Court and not by the European Commission, the Court has taken over the former Commission's functions after the entry into force of Protocol No. 11 on 1 November 1998, when all cases previously pending before the Commission were transferred to the new European Court. The new Court must therefore be considered the former Commission's successor.

4.5 Finally, the State party submits that the fact that the European Court did not inform the first author of its intention to dismiss his application does not constitute a reason for which the Austrian reservation could not apply in the present case.

Comments by the authors

5.1 By letter of 15 October 2001, the first author amended the communication so as to include his wife and the "Hotel zum Hirschen Josef Wallmann" limited partnership as additional authors.

5.2 In response to the State party's observations on admissibility, the authors submit that permissible and duly accepted reservations to international treaties become integral parts of these treaties and must therefore be interpreted in the light of the rules in articles 31 and 32 of the Vienna Convention on the Law of Treaties. Since the Austrian reservation, pursuant to the ordinary meaning of its wording, clearly refers to an examination by the European Commission of Human Rights, no room is left for an interpretation based on its context or object and purpose, let alone the supplemental means of treaty interpretation in article 32 of the Vienna Convention (*travaux préparatoires* and circumstances of treaty conclusion). The ordinary meaning of the reservation's text being equally clear in requiring that the same matter "has not been examined"[4] by the European Commission, the mere fact that the first author submitted an application to the former Commission is not sufficient to justify the applicability of the reservation to his present communication.

5.3 The authors reiterate that the application was never "examined" by the European Commission, as the secretariat's letter of 10 July 1998, informing the first author of certain admissibility-related concerns, was sent at a time when the application had neither been registered nor brought to the attention of the Commission. Similarly, the Commission never examined the application after it had been registered because of its referral to the new European Court, after entry into force of Protocol No. 11.

5.4 The authors reject the State party's argument that the new European Court simply replaced the former European Commission and that the Austrian reservation, despite its wording, should cover cases in which the same matter was examined by the new Court, on the basis that the new Court's competencies are broader than those of the former Commission.

5.5 Moreover, the authors argue that, in any event, it appeared from the reference, in the European Court's decision, to the letter of 10 July 1998 of the secretariat that the Court rejected the application as inadmissible *ratione materiae* with article 11 of the Convention, which cannot, however, be considered an examination within the meaning of the Austrian reservation, in accordance with the Committee's jurisprudence.[5]

5.6 The authors recall that the Austrian reservation to article 5 (2) (a) of the Optional Protocol is the only one explicitly referring to the "European Commission of Human Rights" instead of "another procedure of international investigation or settlement". The aim of the drafters of the reservation is said to be irrelevant, because the clear and ordinary meaning of the Austrian reservation does not permit having resort to supplemental means of treaty interpretation within the meaning of article 32 of the Vienna Convention.

5.7 By reference to the jurisprudence of the European and the Inter-American Courts of Human Rights, the authors emphasize that reservations to human rights treaties must be interpreted in favour of the individual. Any attempt to broaden the scope of the Austrian reservation should be rejected, as the Committee disposes of adequate tools to prevent an improper use of parallel proceedings, such as the concepts of "substantiation of claims" and "abuse of the right to petition", in addition to article 5, paragraph 2 (a), of the Optional Protocol.

5.8 The authors conclude that the communication is admissible under article 5, paragraph 2 (a), of the Optional Protocol, insofar as the first author is concerned, because the same matter is not being examined by another procedure of international investigation or settlement and since the Austrian reservation does not apply. Insofar as the second and the third authors are concerned, there is no need for the Committee to consider whether the Austrian reservation to article 5, paragraph 2 (a), applies, since these authors did not petition the European Commission or Court of Human Rights.[6]

5.9 Lastly, the authors submit that they have sufficiently substantiated, for purposes of admissibility, that the Austrian Federal and the Regional Chambers of Commerce perform the functions of associations within the meaning of article 22, paragraph 1, of the Covenant.

Additional observations by the State party

6.1 On 30 January 2002, the State party submitted further observations on the admissibility and, in addition, on the merits of the communication. It argues that the communication is inadmissible under articles 1 and 2 of the Optional Protocol, insofar as the third author is concerned, since, according to the Committee's jurisprudence,[7] associations and corporations cannot be considered individuals, nor can they claim to be victims of a violation of any of the rights protected in the Covenant.

6.2 The State party submits that the communication is also inadmissible with regard to the first and second authors, because they are essentially claiming violations of the rights of their partnership. Although, as a limited partnership, the "Hotel zum Hirschen Joseph Wallmann" has no legal personality, it may act in the same way as entities with legal personality in its legal relations, which was reflected by the fact that the "Hotel zum Hirschen Josef Wallmann" was a party to the domestic proceedings. Since all domestic remedies were brought in the name of the third author and no claim related to the first and second authors personally has been substantiated for purposes of article 2 of the Optional Protocol, the first and second authors have no standing under article 1 of the Optional Protocol. The first and second authors also failed to exhaust domestic remedies, as only the third author was a party to the domestic proceedings.

6.3 Furthermore, the second author cannot claim to be a victim of the impugned decision of the Salzburg Regional Chamber of Commerce of 26 June 1996, as she only became a partner of the limited partnership and shareholder of the limited liability company in December 1999.

6.4 With regard to the authors' argument that the Austrian reservation only refers to the European Commission but not to the European Court of Human Rights, the State party explains that the reservation was made on the basis of a recommendation by the Committee of Ministers, which suggested that member States of the Council of Europe, "which sign or ratify the Optional Protocol might wish to make a declaration […] whose effect would be that the competence of the United Nations Human Rights Committee would not extend to receiving and considering individual complaints relating to cases which are being or already have been examined under the procedure provided for by the European Convention".[8]

6.5 The State party submits that its reservation differs from similar reservations made by other member States only insofar as it directly addresses the relevant Convention mechanism, for the sake of clarity. All reservations aim at preventing any further international examination following a decision of the review mechanism established by the European Convention. It would, therefore, be inappropriate to deny the Austrian reservation its validity and continued scope of application merely because of the organizational reform of the review mechanism.

6.6 The State party notes that, because of the merger of the European Commission and the "old" Court, the "new" European Court can be considered the "legal successor" of the Commission, since most of its key functions were formerly discharged by the Commission. Given that the reference to the European Commission in the State party's reservation was specifically made in respect of these functions, the reservation remains fully operative after the entry into force of Protocol No. 11. The State party contends that it was not foreseeable, when it entered its reservation in 1987, that the review mechanisms of the European Convention would be modified.

6.7 The State party again emphasizes that the same matter was already examined by the European Court which, in order to reject the author's application as being inadmissible, under article 35, paragraphs 3 and 4 of the European Convention, had to examine it on the merits, if only summarily. It concludes that the communication is inadmissible under article 5, paragraph 2 (a), of the Optional Protocol.

6.8 On the merits, the State party submits that the Austrian Chamber of Commerce is a public organization, established by law rather than private initiative, and to which article 22 of the Covenant does not apply. Compulsory membership in chambers, such as chambers for workers and employees, agricultural chambers, and chambers for the self-employed, is commonplace under Austrian law. Certain characteristics of the Chamber of Commerce are laid down in the Austrian Constitution, including its compulsory membership, its organization as a public law organization, its financial and administrative autonomy, its democratic structure and its supervision by the State, including the supervision of its financial activities by the Court of Audit. Moreover, the Chamber participates in matters of public administration by commenting on bills of Parliament, which have to be submitted to experts of the Chamber, by nominating lay judges for labour and social courts, as well as delegates for a large number of commissions in the field of public administration.

6.9 The State party refutes the authors' arguments equating the Federal and Regional Chambers with private associations (see paragraph 3.2), arguing that (1) the representation of the common economic interests of Chamber members is in the public interest; (2) the Chamber is a non-profit organization, whose membership fees are limited and must not exceed the amount required for the necessary expenses, pursuant to article 131 of the Chamber of Commerce Act; (3) the addresses of Chamber members are accessible to the general public through the Trade Register; (4) the fact that the Chamber has no disciplinary powers does not compel the conclusion that the Chamber is not a professional organization, as the existence of disciplinary powers is not a constitutive element of such organizations; (5) except for disciplinary matters, the Chamber can in every respect be compared to professional organizations in the public interest.

6.10 The State party submits that any comparison with the structure of commerce chambers in other European countries fails to recognize that the Austrian Chamber could not fulfil the public functions assigned to it if it were treated on an equal basis with private associations. The public law character of the Chamber was also confirmed by the European Court of Human Rights,[9] on the basis that it was created by law and not by private act and that it discharges functions in the public interest, such as the prevention of unfair trade practices, the promotion of professional training and the supervision of the actions of its members. The State party endorses the European Court's conclusion that article 11 of the European Convention does not apply to the Chamber of Commerce and considers the argument applicable to article 22 of the Covenant.

6.11 Concerning the author's contention that the annual membership fees of the Chamber in their effect prevent members from founding or joining alternative associations, the State party submits that these fees are relatively modest compared with the authors' other expenses and are tax deductible, as are contributions to private professional or trade organizations. The annual contribution to the private Association of Hotel Owners, ranging between 5,000 and ATS 24,000, has not prevented its nearly 1,000 members from joining the Association. In the authors' case, the fee would amount to less than ATS 10,000, a fee they could afford.

Additional comments by the authors

7.1 By letter of 11 March 2002, the authors responded to the State party's additional observations. While agreeing that the Committee has, in principle, held so far that only individuals can lodge communications, they argue that nothing precludes several persons who are engaged in the same commercial activity from submitting a complaint together.[10] According to the Committee's jurisprudence,[11] such "categories of persons" form a semi-independent entity for purposes of admissibility under articles 1 and 2 of the Optional Protocol, while the individuals concerned merely stand behind that entity. The standing of "categories of persons" thus points to a developing practice which will eventually result in the recognition of entities made up of individuals as authors of communications.

7.2 The authors submit that, by denying that the first and second authors have substantiated a violation of their own rights, the State party overlooks that the right to freedom of association under article 22 is "by [its] nature inalienably linked to the person".[12] The fact that this right is also linked, to a certain extent, to commercial activities does not make it less protected.[13] Since the first and second authors have been personally affected in their economic activities by the levy of annual membership dues, based on their compulsory membership in the Chamber of Commerce, they did not lose their individual rights simply because they founded a business pursuant to the requirements of domestic law, nor did they lose the right to claim these rights by means of individual petition.[14]

7.3 On domestic remedies, the authors argue that in the absence of any specification by the State party as to which other proceedings the first and second authors could have initiated under Austrian law to claim their right to freedom of association, apart from appealing the Chamber's decision and lodging a constitutional complaint, in the name of the limited partnership, the State party's procedural objection must fail.[15] Moreover, through these proceedings, the State party was given an opportunity to remedy the alleged violation of article 22 of the Covenant, which, according to the Committee's jurisprudence,[16] is the main purpose of the requirement to exhaust domestic remedies.

7.4 As to the alleged failure of the second author to substantiate her claim to be a victim of a violation of article 22, the authors submit that the "Hotel zum Hirschen Joseph Wallmann" limited partnership continues to be a compulsory member of the Chamber of Commerce. While their communication was originally directed against the decision determining the membership fees for 1996, subsequent decisions concerning membership fees have been similar. The second author was affected by these decisions, once she became a partner and shareholder of the "Wallmann Gesellschaft mit beschränkter Haftung".

7.5 Regarding exhaustion of domestic remedies against subsequent decisions of the Salzburg Regional Chamber, the authors state that the Federal Chamber of Commerce, on 13 October 1998 and 16 December 1999, respectively, dismissed the third author's appeals against the decisions concerning its membership fees for 1998 and 1999. No further appeals were brought against these dismissals, since such remedies would have been futile, in the light of the Constitutional Court's consistent jurisprudence and, in particular, its decision of 28 November 1997 rejecting the constitutional complaint concerning the membership fees for 1996.[17]

7.6 With respect to the Austrian reservation, the authors reiterate that nothing prevented the State party from entering a reservation upon ratification of the Optional Protocol precluding the Committee from examining communications if the same matter has already been examined "under the procedure provided for by the European Convention", as recommended by the Committee of Ministers, or from using the broader formulation of a previous examination by "another procedure of international investigation or settlement", as other States parties to the European Convention did.

7.7 Moreover, the authors submit that the State party is free to consider entering a reservation to that effect by re-ratifying the Optional Protocol, as long as such a reservation could be deemed compatible with its object and purpose. What is not permissible, in their view, is to broaden the scope of the existing reservation in a way contrary to fundamental rules of treaty interpretation.

7.8 The authors reject the State party's argument that key tasks of the "new" European Court, such as decisions on admissibility and establishment of the facts of a case, were originally within the exclusive competence of the European Commission, arguing that the "old" European Court also consistently dealt with these matters. They question that the reorganization of the Convention organs was not foreseeable in 1987 and quote parts of the Explanatory Report to Protocol No. 11, summarizing the history of the "merger" deliberations from 1982 until 1987.

7.9 On the merits, the authors contest the State party's arguments to the effect that the Chamber of Commerce is a public law organization, by submitting (1) that the mere fact that the Chamber was established by law does not make it a public law organization; (2) that the right to comment on draft laws is not peculiar to public law organizations; (3) that the Court of Audit supervises the financial activities of many entities, including companies partly owned by the State; (4) that members of commissions in the field of public administration are nominated not only by certain chambers, but also by associations representing relevant interest groups such as trade unions or the churches.

7.10 Moreover, the authors argue (1) that, while the fact that groups of people have the opportunity to have their interests represented may be in the public interest, this does not convert the economic interests of the Chamber members into the "public interest"; (2) that the Chamber engages in extensive profit-based economic activity, as it is a shareholder of companies and undertakes advertisement campaigns on behalf of its members; (3) that the task of sanctioning members who infringe professional duties constitutes the crucial characteristic of professional organizations operating in the public interest, according to the case law of the European Commission of Human Rights;[18] (4) that the European Court of Human Rights confirmed the public law character of the Austrian Chamber of Commerce, in 1991, merely on the basis of the domestic laws establishing the Chamber without making a substantive assessment of the question;[19] (5) that the Chamber is merely a private association, which is unjustifiable given special powers to participate in all branches of government and to require compulsory membership.

7.11 As regards their freedom to found and join other associations, the authors submit that compulsory membership in one entity will generally affect adversely their resolve to found and join another association, as well as their prospects of convincing other compulsory members to join the alternative association. They reiterate that the annual membership fees, amounting to ATS 40,000, is not an amount they can easily afford, given the losses of the limited partnership over the past years and the need for improving the hotel's facilities.[20]

7.12 The authors reiterate that they have sufficiently substantiated their claim, at least for purposes of admissibility.

Issues and proceedings before the Committee

Consideration of admissibility

8.1 Before considering any claim contained in a communication, the Human Rights Committee must, in accordance with rule 87 of its rules of procedure, decide whether or not the communication is admissible under the Optional Protocol to the Covenant.

8.2 The Committee notes that the State party has invoked its reservation under article 5, paragraph 2 (a), of the Optional Protocol, which precludes the Committee from considering claims if the "same matter" has previously been examined by the "European Commission on Human Rights". As to the authors' argument that the first author's application to the European Commission was, in fact, never examined by that organ but declared inadmissible by the European Court of Human Rights, the Committee observes that the European Court, as a result of treaty amendment by virtue of Protocol No. 11, has legally assumed the former European Commission's tasks of receiving, deciding on the admissibility of, and making a first assessment on the merits of applications submitted under the European Convention. The Committee recalls that, for purposes of ascertaining the existence of parallel or, as the case may be, successive proceedings before the Committee and the Strasbourg organs, the new European Court of Human Rights has succeeded to the former European Commission by taking over its functions.[21]

8.3 The Committee considers that a reformulation of the State party's reservation, upon re-ratification of the Optional Protocol, as suggested by the authors, only to spell out what is in fact a logical consequence of the reform of the European Convention mechanisms, would be a purely formalistic exercise. For reasons of continuity and in the light of its object and purpose, the Committee therefore interprets the State party's reservation as applying also to complaints which have been examined by the European Court.[22]

8.4 As to the question of whether the subject matter of the present communication is the same matter as the one examined by the European Court, the Committee recalls that the same matter concerns the same authors, the same facts and the same substantive rights. The first two requirements being met, the Committee observes that article 11, paragraph 1, of the

European Convention, as interpreted by the Strasbourg organs, is sufficiently proximate to article 22, paragraph 1, of the Covenant[23] now invoked, to conclude that the relevant substantive rights relate to the same matter.

8.5 With respect to the authors' argument that the European Court has not "examined" the substance of the complaint when it declared the first author's application inadmissible, the Committee recalls its jurisprudence that where the European Commission has based a declaration of inadmissibility not solely on procedural grounds,[24] but on reasons that include a certain consideration of the merits of the case, then the same matter has been "examined" within the meaning of the respective reservations to article 5, paragraph 2 (a), of the Optional Protocol.[25] The Committee is satisfied that the European Court went beyond an examination of purely procedural admissibility criteria when declaring the first author's application inadmissible, because it did "not disclose any appearance of a violation of the rights and freedoms set out in the Convention or its Protocols".

8.6 The Committee notes that, the authors, based on the reference in the European Court's decision to the letter of the European Commission's secretariat, explaining the possible obstacles to admissibility, argue that the application was declared inadmissible *ratione materiae* with article 11 of the Convention, and that it has therefore not been "examined" within the meaning of the Austrian reservation. However, it cannot be ascertained, in the present case, on exactly which grounds the European Court dismissed the first author's application when it declared it inadmissible under article 35, paragraph 4, of the Convention.[26]

8.7 Having concluded that the State party's reservation applies, the Committee concludes that the communication is inadmissible under article 5, paragraph 2 (a), of the Optional Protocol, insofar as the first author is concerned, since the same matter has already been examined by the European Court of Human Rights.

8.8 The Committee observes that the examination of the application by the European Court did not concern the second author, whose communication, moreover, relates to different facts than the first author's application to the European Commission, namely the imposition of membership fees by the Salzburg Regional Chamber after she had become a partner of the limited partnership as well as a shareholder of the limited liability company in December 1999. The State party's reservation does not therefore apply insofar as the second author is concerned.

8.9 The Committee considers that the second author has substantiated, for purposes of article 2 of the Optional Protocol, that the applicability of article 22 of the Covenant to the Austrian Chamber of Commerce cannot a priori be excluded. It further notes that the "Hotel zum Hirschen Josef Wallmann KG", being a limited partnership, has no legal personality under Austrian law. Notwithstanding the fact that the third author has, and availed itself of its, capacity to take part in domestic court proceedings, the second author, who holds 100 per cent of the shares of the limited partnership, is, in her capacity as partner, liable for the third author's obligations vis-à-vis its creditors. The Committee therefore considers that the second author is directly and personally affected by the third author's compulsory membership in the Chamber and the resulting annual membership fees, and that she can therefore claim to be a victim of a violation of article 22 of the Covenant.

8.10 To the extent that the second author complains that the practical effect of the annual membership fees is to prevent her from founding or joining alternative associations, the Committee finds that she failed to substantiate, for purposes of admissibility, that the annual payments to the Chamber is so onerous as to constitute a relevant restriction on her right to freedom of association. The Committee concludes that this part of the communication is inadmissible under article 2 of the Optional Protocol.

8.11 As to the State party's objection that the second author failed to exhaust domestic remedies, as the limited partnership itself was party to the domestic proceedings, the Committee recalls that wherever the jurisprudence of the highest domestic tribunals has decided the matter at issue, thereby eliminating any prospect of success of an appeal to the domestic courts, authors are not required to exhaust domestic remedies.[27] The Committee notes that the State party has not shown how the prospects of an appeal by the second author against the levy of annual membership fees by the Chamber for the years 1999 onwards would have differed from those of the appeal lodged by the limited partnership and eventually dismissed by the Austrian Constitutional Court in 1998, for lack of reasonable prospect of success.

8.12 Accordingly, the Committee concludes that the communication is admissible insofar as the second author complains, as such, about the compulsory membership of the "Hotel zum Hirschen Joseph Wallmann" limited partnership in the Chamber of Commerce and the resulting membership fees charged since December 1999.

8.13 Regarding the third author, the Committee notes that the "Hotel zum Hirschen Josef Wallmann" is not an individual, and as such cannot submit a communication under the Optional Protocol. The communication is therefore inadmissible under article 1 of the Optional Protocol, insofar as it is submitted on behalf of the third author.

Consideration of the merits

9.1 The Human Rights Committee has considered the present communication in the light of all the information made available to it by the parties, as provided in article 5, paragraph 1, of the Optional Protocol.

9.2 The issue before the Committee is whether the imposition of annual membership fees on the "Hotel zum Hirschen" (third author) by the Salzburg Regional Chamber of Commerce amounts to a violation of the second author's right to freedom of association under article 22 of the Covenant.

9.3 The Committee has noted the authors' contention that, although the Chamber of Commerce constitutes a public law organization under Austrian law, its qualification as an "association" within the meaning of article 22, paragraph 1, of the Covenant has to be determined on the basis of international standards, given the numerous non-public functions of the Chamber. It has equally taken note of the State party's argument that the Chamber forms a public organization under Austrian law, on account of its participation in matters of public administration as well as its public interest objectives, therefore not falling under the scope of application of article 22.

9.4 The Committee observes that the Austrian Chamber of Commerce was founded by law rather than by private agreement, and that its members are subordinated by law to its power to charge annual membership fees. It further observes that article 22 of the Covenant only applies to private associations, including for purposes of membership.

9.5 The Committee considers that once the law of a State party establishes commerce chambers as organizations under public law, these organizations are not precluded by article 22 of the Covenant from imposing annual membership fees on its members, unless such establishment under public law aims at circumventing the guarantees contained in article 22. However, it does not appear from the material before the Committee that the qualification of the Austrian Chamber of Commerce as a public law organization, as envisaged in the Austrian Constitution as well as in the Chamber of Commerce Act of 1998, amounts to a circumvention of article 22 of the Covenant. The Committee therefore concludes that the third author's compulsory membership in the Austrian Chamber of Commerce and the annual membership fees imposed since 1999 do not constitute an interference with the second author's rights under article 22.

10. The Human Rights Committee, acting under article 5, paragraph 4, of the Optional Protocol, is of the view that the facts before it do not disclose a violation of article 22, paragraph 1, of the Covenant.

[Adopted in English, French and Spanish, the English text being the original version. Subsequently to be issued also in Arabic, Chinese and Russian as part of the present report.]

Notes

[1] The Covenant and the Optional Protocol to the Covenant entered into force for the State party respectively on 10 December 1978 and 10 March 1988. Upon ratification of the Optional Protocol on 10 December 1987, the State party entered the following reservation: "On the understanding that, further to the provisions of article 5 (2) of the Protocol, the Committee provided for in article 28 of the Covenant shall not consider any communication from an individual unless it has been ascertained that the same matter has not been examined by the European Commission on Human Rights established by the European Convention for the Protection of Human Rights and Fundamental Freedoms."

[2] 1 euro is equivalent to ATS 13.76.

[3] See European Court of Human Rights, Third Section, decision on the admissibility of application No. 42704/98 (*Franz Wallmann v. Austria*), 31 October 2000.

[4] Emphasis added.

[5] The authors refer to communication No. 441/1990, *Robert Casanovas v. France*, Views adopted on 19 July 1994, UN Doc. CCPR/C/51/D/441/1990, at para. 5.1, and communication No. 808/1998, *Georg Rogl v. Germany*, decision on admissibility adopted on 25 October 2000, UN Doc. CCPR/C/70/D/808/1998, at paras. 9.3 et seq.

[6] In this regard, the authors refer to communication No. 645/1995, *Vaihere Bordes and John Temeharo v. France*, decision on admissibility adopted on 22 July 1996, UN Doc. CCPR/C/57/D/645/1995, at para. 5.2.

[7] The State party refers to communications No. 104/1981, *J.R.T. and the W.G. Party v. Canada*, decision on admissibility adopted on 6 April 1983, UN Doc. CCPR/C/18/D/104/1981, at para. 8 (a); No. 502/1992, *S.M. v. Barbados*, decision on admissibility adopted on 31 March 1994, UN Doc. CCPR/C/50/D/502/1992, at para. 6.3, and No. 737/1997, *Michelle Lamagna v. Australia*, decision on admissibility adopted on 7 April 1999, UN Doc. CCPR/C/65/D/737/1997, at para. 6.2.

[8] Council of Europe, Committee of Ministers Resolution (70) 17 of 15 May 1970.

[9] The State party refers to the Court's decision on admissibility on application No. 14596/89 (*Weiss v. Austria*), 10 July 1991.

[10] The authors refer to communication No. 273/1988, *B.d.B. et al. v. The Netherlands*, decision on admissibility of 30 March 1989, UN Doc. CCPR/C/35/D/273/1988.

[11] Reference is made to communication No. 359/1989, *John Ballantyne, Elizabeth Davidson and Gordon McIntyre v. Canada*, Views adopted on 31 March 1991, UN Doc. CCPR/C/47/D/359/1989, at para. 10.4.

[12] Quoted from communication No. 455/1991, *Allan Singer v. Canada*, Views adopted on 26 July 1994, UN Doc. CCPR/C/51/D/455/1991, at para. 11.2.

[13] The authors refer to communication No. 359/1989, *John Ballantyne, Elizabeth Davidson and Gordon McIntyre v. Canada*, Views adopted on 31 March 1991, UN Doc. CCPR/C/47/D/359/1989, at para. 11.3.

[14] In support of this claim, the authors refer to communication No. 273/1988, *B.d.B. v. The Netherlands*, decision on admissibility adopted on 30 March 1989, UN Doc. CCPR/C/35/D/273/1988 and communication No. 316/1988, *C.E.A. v. Finland*, decision on admissibility adopted on 10 July 1991, UN Doc. CCPR/C/42/D/316/1988.

[15] The authors refer to communication No. 83/1981, *Machado v. Uruguay*, Views adopted on 4 November 1983, UN Doc. CCPR/C/20/D/83/1981, at para. 6

[16] Reference is made to communications No. 220/1987, *T.K. v. France*, decision on admissibility adopted on 8 November 1989, UN Doc. CCPR/C/37/D/220/1987, at para. 8.3, and No. 222/1987, *H.K. v. France*, decision on admissibility adopted on 8 November 1989, UN Doc. CCPR/C/37/D/222/1987, at para. 8.3.

[17] The authors refer to communication No. 210/1985, *Wim Hendriks v. The Netherlands*, Views adopted on 27 July 1988, UN Doc. CCPR/C/33/D/201/1985, at para. 6.3.

[18] The authors refer to the Commission's decisions on applications No. 19363/92 (*Gerhard Hirmann v. Austria*), 2 March 1994, and No. 14331-2/88 (*Paul Revert and Denis Legallais v. France*), 8 September 1989.

[19] The decision criticized is application No. 14596/89 (*Franz Jakob Weis v. Austria*), decision on admissibility of 10 July 1991.

[20] Both the losses of the limited partnership as well as the necessary improvements of the facilities of the hotel are specified in the communication.

[21] See communication No. 989/2001, *Kollar v. Austria*, decision on admissibility adopted on 30 July 2003, UN Doc. CCPR/C/78/D/989/2003, at para. 8.2.

[22] See ibid., at para. 8.3.

[23] Cf. Nowak, Manfred, *U.N. Covenant on Civil and Political Rights - CCPR Commentary* (1993), at p. 387.

[24] See, for example, communication No. 716/1996, *Pauger v. Austria*, Views adopted on 25 March 1999, UN Doc. CCPR/C/65/D/716/1996, at para. 6.4.

[25] See, for example, communications No. 121/1982, *A.M. v. Denmark*, decision on admissibility adopted on 23 July 1982, UN Doc. CCPR/C/16/D/121/1982, at para. 6, and No. 744/1997, *Linderholm v. Croatia*, decision on admissibility adopted on 23 July 1999, UN Doc. CCPR/C/66/D/744/1997, at para. 4.2.

[26] Article 35, paragraph 4, of the European Convention reads, in pertinent parts: "The Court shall reject any application which it considers inadmissible under this article." This refers, inter alia, to the inadmissibility grounds set out in article 35, paragraph 3, i.e. inadmissibility *ratione materiae*, manifestly ill-founded applications, and abuse of the right of application.

[27] See, for example, communication No. 511/1992, *Länsman et al. v. Finland*, at para. 6.1.

X. Communication No. 1006/2001, *Martinez Muñoz v. Spain* (Views adopted on 23 October 2003, seventy-ninth session)*

Submitted by:	Mr. José Antonio Martínez Muñoz (represented by Mr. José Luis Mazón Costa)
Alleged victim:	The author
State party:	Spain
Date of communication:	15 November 2000 (initial communication)

The Human Rights Committee, established under article 28 of the International Covenant on Civil and Political Rights,

Meeting on 30 October 2003,

Having concluded its consideration of communication No. 1006/2001, submitted on behalf of Mr. José Antonio Martínez Muñoz under the Optional Protocol to the International Covenant on Civil and Political Rights,

Having taken into account all written information made available to it by the author of the communication, and the State party,

Adopts the following:

Views under article 5, paragraph 4, of the Optional Protocol

1. The author of the communication dated 3 May 1999 is José Antonio Martínez Muñoz, a citizen of Spain, who claims to be a victim of a violation by Spain of article 14, paragraph 1, article 14, paragraph 3 (b), (c) and (d), and article 17 of the International Covenant on Civil and Political Rights. He is represented by counsel. The Optional Protocol entered into force for Spain on 25 January 1985.

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* The following members of the Committee participated in the examination of the present communication: Mr. Abdelfattah Amor, Mr. Nisuke Ando, Mr. Prafullachandra Natwarlal Bhagwati, Mr. Alfredo Castillero Hoyos, Ms. Christine Chanet, Mr. Franco Depasquale, Mr. Maurice Glèlè Ahanhanzo, Mr. Walter Kälin, Mr. Ahmed Tawfik Khalil, Mr. Rajsoomer Lallah, Mr. Rafael Rivas Posada, Sir Nigel Rodley, Mr. Martin Scheinin, Mr. Ivan Shearer, Mr. Hipólito Solari Yrigoyen, Ms. Ruth Wedgwood, Mr. Roman Wieruszewski and Mr. Maxwell Yalden.

The text of one individual opinion signed by Committee members Mr. Nisuke Ando, Ms. Ruth Wedgwood, Mr. Roman Wieruszewski and Mr. Maxwell Yalden are appended to the present document.

The facts as submitted by the author

2.1 On 21 September 1990, the author, together with six other persons, took part in writing *pintadas* ("graffiti") in favour of the right to refuse to perform military service, on the outer facade of the bullring in the town of Yecla. For this reason, they were intercepted by two local policemen. The author alleges that, when one of the policemen attempted to arrest him, a struggle ensued and he accidentally struck the policeman in one eye, causing a contusion.

2.2 The author was held in custody on 21 September 1990 and released on 22 September 1990. The hearing took place on 14 June 1995. The author was accused by the prosecutor of two misdemeanours and an offence and, on 16 June 1995, Criminal Court No. 3 of Murcia sentenced him for the offence of attacking a law enforcement officer to a penalty of six months' and one day's imprisonment and compensation in the amount of 70,000 pesetas in favour of the injured policeman.

2.3 The author filed an appeal to the Murcia Provincial High Court, claiming a violation of the principle of equality before the law and of equality of arms, as well as a violation of his right to a defence. All the allegations were dismissed on 20 November 1995.

2.4 The author filed an application for *amparo* and requested the Constitutional Court to allow him to dispense with the *procurador* and to represent himself. That request was denied on 15 January 1996. The author then requested the court to appoint a *procurador*. When that person had been appointed in accordance with article 27 of the Free Legal Assistance Act, the Constitutional Court required the freely chosen lawyer to waive his fees. In the light of this requirement, the author filed an application for reconsideration, which was rejected on 22 March 1996.

2.5 When the freely chosen lawyer refused to waive his fees, on 13 December 1995 the author requested the court to appoint counsel. The lawyer assigned to him requested the Constitutional Court to excuse her from filing an application for *amparo*, since she believed that that remedy was unnecessary because there had been no violation of fundamental human rights.

2.6 The author said that he wished to dismiss the court-appointed counsel. On 1 July 1996, the Constitutional Court informed him that it could not accede to his request but transmitted the pleas of fact to the General Council of Spanish Lawyers which, on 9 September 1996, concluded that the application for *amparo* that the author's court-appointed counsel had not filed was partly sustainable, since it could be admissible only with respect to the complaint of undue delay in the proceedings.

2.7 On 7 October 1996, the author was assigned another counsel, who was given 20 days to file an application for *amparo*. The application was filed in connection with the alleged undue delay in the proceedings and, on 5 March 1997, was rejected by the Constitutional Court, which considered that the application did not contain enough information to justify a decision.

The complaint

3.1 The author complains of violations of article 14, paragraph 1, of the Covenant. He claims a violation of the principles of equality before the law and of equality of arms, arguing that, during the proceedings, "inexplicable privileges" were granted to the prosecution, such as allowing it to propose certain measures. He also claims that, since he was not allowed to dispense with a *procurador* and represent himself before the Constitutional Court, he was placed in a situation of inequality with respect to persons with a law degree. For the author, the provisions of article 81, paragraph 1, of the Constitutional Court Organization Act constitutes an unjustified inequality since, according to that paragraph, the services of the *procurador* are limited to the transmission of documents between the court and counsel.

3.2 The author claims that his right to a defence under article 14, paragraph 3 (b), of the Covenant was violated in that Murcia Criminal Court No. 3 did not allow his lawyer to question him properly, claiming that the interrogation was being conducted in a tendentious manner. The court also did not allow his lawyer to have one of the witnesses re-enact the incident, evidence that was of fundamental importance to his defence since, according to the author, it would have made it possible to prove that he had struck the [policeman in the] eye by accident.

3.3 The author maintains that article 14, paragraph 3 (c), of the Covenant was violated since, owing to the lapse of almost five years between the incident, which occurred on 21 September 1990, and the hearing, which was held on 14 June 1995, his right to a speedy trial without undue delay was violated since, according to him, the relative straightforwardness of the case did not justify such a long delay.

3.4 The author claims a violation of article 14, paragraph 3 (d), of the Covenant, which guarantees the right to assigned legal assistance. He maintains that the lawyer assigned to him did not comply with her duty to defend him effectively before the Constitutional Court. The author states that, by refusing to file the relevant remedy, the lawyer prejudged his case.

3.5 The author claims a violation of article 17 of the Covenant, since the law provides that the freely chosen lawyer has the obligation to waive his fees when acting together with a court-appointed *procurador*. According to the author, this constitutes arbitrary interference in the private relationship between the lawyer and his client.

The State party's observations on admissibility and the merits

4.1 In its submission dated 1 October 2001, the State party challenges the admissibility of the communication on the basis of article 2 of the Optional Protocol, claiming that domestic remedies were not exhausted since, although the author had appealed the decision of Criminal Court No. 3 to the Murcia Provincial High Court, neither he nor his lawyer was present when his appeal was heard at which time the author would have had an opportunity to state his allegations. The State party claims that, by not attending the hearing of his appeal, the author voluntarily renounced the possibility of filing or rectifying complaints. Therefore, when hearing the appeal, the National High Court had had to limit itself to the content of the written appeal.

4.2 The State party alleges that the author's complaint regarding the summary procedure was not lodged with the Spanish courts; it was therefore not examined and no decision was taken on it. The same applies to the complaints concerning the form of the interrogation and representation before the Constitutional Court. The State party maintains that the application for *amparo* that the author's lawyer filed with the Constitutional Court contained only allegations of undue delay in the proceedings; at the same time, a petition for pardon was filed. The Court's decision was limited to consideration of the foregoing.

4.3 The State party alleges that the Constitutional Court in no way opposed the freely chosen lawyer's defence of the author; however, the law on free assistance, which had been applied owing to the author's lack of means, required that the professional lawyer should not receive a fee. Since the lawyer refused to waive his fee, the author dismissed him and requested the court to appoint counsel. The State party affirms that, with regard to the action taken by the court-appointed counsel, the complaint is based on a discrepancy between the actual lawyer and the conduct of appointed counsel. It alleges that, pursuant to a written submission by the first court-appointed counsel, in which she considered the remedy to be unsustainable, the General Council of Spanish Lawyers intervened and, following its ruling, the court appointed another lawyer, who filed the application for *amparo*. The State party therefore maintains the author was assisted by counsel.

4.4 The State party alleges that the facts bear no relation to the right to privacy dealt with in article 17 of the Covenant and that, in accordance with article 3 of the Optional Protocol, the claim should be declared inadmissible *ratione materiae*.

4.5 According to the State party, the author claims that the excessive duration of the proceedings constituted grounds for his pardon. However, it points out that there is no provision in the Covenant to this effect, and that the complaint concerning article 14, paragraph 3 (c), of the Covenant is unsubstantiated. The State party affirms that, in accordance with articles 292 et seq. of the Judiciary Organization Act, an undue delay in the proceedings provides the right to claim economic compensation for the shortcomings of the administration of justice. However, since the author has not filed this legally supported claim, he has not exhausted domestic remedies.

4.6 In its submission dated 18 February 2002, the State party informed the Committee that its observations dated 1 February 2001 should also apply to the merits, arguing that the complaints were not made through domestic channels and, therefore, could not be examined and a decision on them could not be taken. Consequently, the State party was unable to provide information in that regard.

The author's comments on the State party's observations

5.1 In his submission dated 2 January 2002 concerning his appeal, the author claims that his absence at the hearing did not imply the forfeit of the right to an examination of the arguments that he had previously submitted in writing, since the first paragraph of the decision states that "… the absence of the appellant when the appeal was heard in second instance does not prevent the consideration of the reasons for the recourse filed in writing …". The author claims that he was not present at the hearing because the court-appointed *procurador* did not forward the notification to his lawyer in time.

5.2 The author alleges that it should not be considered that his application for *amparo* contained only an allegation concerning undue delay in the proceedings and a petition for pardon. According to him, it should be taken into account that the court-appointed lawyer ignored his arguments and did not present all his complaints before the Constitutional Court, and that this was not the fault of the author but was due to the incompetence of the defence. It was therefore the fault of the State, which hires legal counsel.

5.3 The author affirms that his complaint regarding the lack of equality of arms between the prosecutor and his counsel in the summary criminal proceeding was cited in the appeal and that that matter could not have been brought before the Constitutional Court owing to the unlikelihood of its success.

5.4 With regard to his complaint concerning the shortcomings of the defence, the author alleges that the State party does not give any reasons for its objection. The author insists that the court did not allow his lawyer to ask certain kinds of questions because it considered them deceitful or tendentious; this measure was not applied to the prosecutor, to whom the court granted freedom of interrogation without disallowing questions that also seemed to be formulated in a similar manner.

5.5 The author claims that the Constitutional Court was obliged to allow him to represent himself, since he insists that the duties of the *procurador* are limited to receiving notifications and transmitting them to the lawyer, and that he had requested that the court dispense with the *procurador*, not the lawyer.

5.6 The author states that the two lawyers who were assigned to him did not meet the requirements of effective legal assistance, since they omitted from the application for *amparo* the defendable arguments contained in the appeal. The author therefore insists that this constituted a violation of article 14, paragraph 3 (d), of the Covenant.

5.7 The author maintains that there was a violation of article 17 of the Covenant, claiming that article 27 of the Free Legal Assistance Act provides that the beneficiary of free legal assistance may use his own lawyer and *procurador*, but must pay their fees; on the other hand, when the beneficiary uses a lawyer or *procurador* of his own choosing, the law requires the other appointed professional to waive his fees in writing and before the Bar Association, without this being justified.

5.8 In his submission dated 18 April 2002, the author replies to the State party's observations of 18 February 2002, reiterating the same arguments that he made on 2 January 2002.

Issues and proceedings before the Committee

6.1 Before considering any claims contained in a communication, the Human Rights Committee must, in accordance with rule 87 of its rules of procedure, decide whether or not it is admissible under the Optional Protocol to the Covenant.

6.2 The Committee has ascertained, as required under article 5, paragraph 2 (a), of the Optional Protocol, that the same matter is not being examined under another procedure of international investigation or settlement.

6.3 The author claims a violation of article 14 (1) of the Covenant, arguing that, during the proceedings, privileges were granted to the prosecution, which was allowed to propose measures after the summary procedure had begun. In this regard, the Committee notes that the author does not substantiate his complaint by indicating what these measures were and how they damaged his case. He also does not substantiate his complaint that Murcia Criminal Court No. 3 granted complete freedom of interrogation to the prosecutor, without disallowing questions formulated in a manner similar to that which the author's counsel was not permitted to use. Consequently, this part of the complaint is admissible under article 2 of the Optional Protocol.

6.4 The author also claims a violation of article 14, paragraph 1, of the Covenant, arguing that, since he was not allowed to dispense with a *procurador* and to represent himself before the Constitutional Court, he was placed in a situation of inequality with respect to persons with a law degree; such inequality was not justified. In this regard, the Committee recalls its constant jurisprudence[1] that the requirement for representation by a *procurador* reflects the need for a person with knowledge of the law to be responsible for handling an application to that court. The Committee therefore considers that the author's allegations have not been properly substantiated for the purposes of admissibility. Consequently, this part of the communication is inadmissible under article 2 of the Optional Protocol.

6.5 The author claims that his right to a defence, guaranteed in article 14, paragraph 3 (b), was violated, since the court did not authorize the form - which it called "tendentious" - in which his lawyer wished to question him, nor did it permit the re-enactment of the incident by one of the witnesses, which, according to the author, was crucial to his defence. The Committee notes that the dismissal of that complaint was argued both by the Court of First Instance and by the National High Court in its decision on the appeal. In this regard, the Committee recalls its constant jurisprudence that the interpretation of domestic law in a specific case is essentially a matter for the courts and authorities of the State party concerned. It is therefore not for the Committee to evaluate facts and evidence, unless the domestic decisions are manifestly arbitrary or amount to a denial of justice. In the present case, the author has not substantiated any claim in this regard. Consequently, this part of the communication is declared inadmissible under article 2 of the Optional Protocol.

6.6 The State party submits that the communication should be declared inadmissible, stating that domestic remedies have not been exhausted, as the author failed to avail himself of the administrative remedy envisaged in Law No. 6/1985 on the Judiciary (*Ley Orgánica 6/1985 del Poder Judicial*). This law, in its chapter V, stipulates the conditions under which those who consider themselves prejudiced by an unreasonable delay in judicial proceedings, which constitutes an irregularity in the administration of justice in the State party, may claim compensation from the State. The Committee recalls its jurisprudence in communication No. 864/1999, *Alfonso Ruiz Agudo v. Spain*, according to which domestic remedies are considered as exhausted, despite the possibility of a claim for compensation under administrative law, if judicial proceedings have been unreasonably prolonged without sufficient explanation provided by the State party. In the present case, the events occurred on 21 September 1990; the author was detained the same day and released two days later; he was indicted in 1992; the oral hearing took place on 14 June 1995; the judgement of the first instance tribunal was delivered on 16 June 1995, and the judgement of the Provincial Court of Murcia on 20 November 1995. The appeals lodged by the author were rejected at both stages of the trial and, on 5 March 1997, the Constitutional Tribunal dismissed his complaint about an unreasonable delay. Taking into account this delay, the nature of the offence, and the absence of elements which would have complicated the investigations and judicial proceedings, as well as the absence of an explanation by the State party concerning the delay of such proceedings, the Committee concludes that the communication is admissible with regard to a possible violation of article 14, paragraph 3 (c), of the Covenant.

6.7 The author alleges a violation of article 14, paragraph 3 (d), which guarantees his right to have legal assistance assigned to him, arguing that the court-appointed counsel did fulfil her obligation to defend him effectively before the Constitutional Court. In this regard, the Committee observes that, pursuant to the ruling of the General Council of Spanish Lawyers of 9 September 1996, a new court-appointed counsel was assigned to the author, who filed an application for *amparo* within the time limit established by the Constitutional Court and in accordance with the terms suggested by the General Council of Spanish Lawyers. Consequently, the Committee is of the view that the author does not substantiate his claim for the purposes of admissibility, and declares this part of the claim inadmissible under article 2 of the Optional Protocol.

6.8 The author claims that article 17 of the Covenant has been violated, since the Free Legal Assistance Act requires the freely chosen lawyer to waive his fees when acting together with a court-appointed *procurador*, which amounts to arbitrary interference in the private sphere of client-lawyer relations. None of the arguments adduced by the author leads the Committee to consider that the facts have any bearing on article 17 of the Covenant. Consequently, this part of the complaint should be declared inadmissible under article 2 of the Optional Protocol.

Consideration as to the merits

7.1 The author claims that there were undue delays in his trial, since almost five years elapsed between the date of the incident and the hearing. The Committee notes that the circumstances of the case involved a flagrant offence, and that the evidence required little police investigation and, as the author points out, the low level of complexity of the proceedings did not justify the delay. The Committee recalls its constant jurisprudence that exceptional reasons must be shown to justify delays - in this case, five years - until trial. In the absence of any justification advanced by the State party for the delay, the Committee concludes that there has been a violation of article 14, paragraph 3 (c), of the Covenant.

7.2 In accordance with article 2, paragraph 3 (a), of the Covenant, the State party is under an obligation to provide the author with an effective remedy, including adequate compensation. The State party is also under an obligation to take the necessary measures to ensure that similar violations do not occur in the future.

7.3 On becoming a State party to the Optional Protocol, Spain recognized the competence of the Committee to determine whether or not there has been a violation of the Covenant. Pursuant to article 2 of the Covenant, the State party has undertaken to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the Covenant and to provide an effective and enforceable remedy in case a violation has been established. The Committee

wishes to receive from the State party, within 90 days, information about the measures taken to give effect to the Committee's Views. The State party is requested to publish the Committee's Views.

[Adopted in English, French and Spanish, the Spanish text being the original version. Subsequently to be issued also in Arabic, Chinese and Russian as part of the present report.]

Note

[1] **Communication No. 865/1999, *Alejandro Marín Gómez v. Spain,* Views adopted on 22 October 2001, para. 8.4; communication No. 866/1999, *Marina Torregrosa Lafuente et al. v. Spain,* Views adopted on 16 July 2001, para. 6.3; and communication No. 1005/2001, *Concepción Sánchez González v. Spain,* Views adopted on 22 March 2002, para. 4.3.**

APPENDIX

Individual opinion of Committee members Mr. Nisuke Ando, Mr. Maxwell Yalden, Ms. Ruth Wedgwood and Mr. Roman Wieruszewski

We are unable to share the majority view in the present case that there has been a violation of article 14, paragraph 3 (c), of the Covenant. According to the majority view, there was undue delay in the trial, since almost five years elapsed between the date of the incident and the date of the conviction.

However, the incomplete factual record before the Committee does not substantiate this view. The record indicates that the author was arrested for assaulting a policeman on 21 September 1990, in the town of Yecla, Spain, and was released the next day. On 29 September 1992, there was some sort of judicial hearing on potential charges, but we do not have any account or summary of that hearing before us. A trial took place before a first-instance tribunal on 14 June 1995, with judgement of conviction delivered on 16 June 1995, and the judgement was affirmed by the Provincial High Court on 20 November 1995. On 5 March 1997, Spain's Constitutional Court dismissed the author's claim concerning unreasonable delay on the ground that "the application did not contain enough information to justify a decision". See the Committee's Views, paragraph 2.7.

With due respect to the majority view, we face the same dilemma as the Constitutional Court. The author, represented by legal counsel before this Committee, has not provided an adequately informative chronology of the facts, much less any supporting documents. We do not know when the criminal charges on which he was convicted were actually filed. It is entirely possible that all initial charges were dismissed without prejudice after the defendant's overnight arrest for allegedly striking a policeman in the eye.

Article 14 (3) of the Covenant guarantees the right to "be tried without undue delay" in "the determination of any criminal charge against him". This provision has to be construed with proper attention to widely accepted State practice. In most legal systems, a speedy trial claim is not measured by the gap in time between the date of a criminal incident and its judgement at trial. Rather, speedy trial provisions limit the disposition of pending charges. There is nothing in the record before the Committee that indicates charges were pending from 1990 to 1992. The ability of a State to take some time to consider whether to bring charges will often benefit defendants. In a case that arises out of the posting of political graffiti, a State might reflect on whether or not to proffer charges. The proffering of charges is, of course, subject to some time limits as well. In most legal systems, a statute of limitations runs from the date of the incident. But for serious charges, the statute of limitations can be as long as five years or more.

In the present case, the entire first-instance trial process was complete within five years. As noted above, Spain's Constitutional Court dismissed the author's claim concerning unreasonable delay on the ground that "the application did not contain enough information to justify a decision". In this connection, we would like to emphasize that the Committee should make it a matter of routine to obtain and translate the judgement of the appellate court that has heard the precise claim brought before the Committee. Especially where an author is represented by counsel, the burden of substantiating the claim is properly put on the author.

Under the circumstances of the present case, we consider it difficult to conclude that the trial process as a whole has suffered undue delay or that it constitutes a violation of article 14, paragraph 3 (c). Perhaps the Committee would have been more prudent to conclude that the author failed to substantiate his claim for the purpose of admissibility.

(*Signed*): Mr. Nisuke Ando

(*Signed*): Mr. Maxwell Yalden

(*Signed*): Ms. Ruth Wedgwood

(*Signed*): Mr. Roman Wieruszewski

[Adopted in English, French and Spanish, the English text being the original version. Subsequently to be issued also in Arabic, Chinese and Russian as part of the present report.]

Y. Communication No. 1011/2001, *Madafferi v. Australia* (Views adopted on 28 July 2004, eighty-first session)*

Submitted by:	Francesco Madafferi and Anna Maria Immacolata Madafferi (represented by counsel, Mr. Mauro Gagliardi and Mr. Acquaro)
Alleged victim:	The authors and their four children, Giovanni Madafferi, Julia Madafferi, Giuseppina Madafferi and Antonio Madafferi
State party:	Australia
Date of initial communication:	16 July 2001 (initial submission)

The Human Rights Committee, established under article 28 of the International Covenant on Civil and Political Rights,

Meeting on 26 July 2004,

Having concluded its consideration of communication No. 1011/2001, submitted to the Human Rights Committee on behalf of Francesco Madafferi, Anna Maria Immacolata Madafferi and their four children, under the Optional Protocol to the International Covenant on Civil and Political Rights,

Having taken into account all written information made available to it by the authors of the communication, and the State party,

Adopts the following:

Views under article 5, paragraph 4, of the Optional Protocol

1.1 The authors of the communication are Francesco Madafferi, an Italian national, born on 10 January 1961 and Anna Maria Madafferi, an Australian national, also writing on behalf of their children Giovanni Madafferi, born 4 June 1991, Julia Madafferi, born 26 May 1993, Giuseppina Madafferi, born 10 July 1996, and Antonio Madafferi, born 17 July 2001. All four children are Australian nationals. Francesco Madafferi is currently residing with his family in Melbourne, Victoria, Australia. The authors claim to be victims of violations by Australia of articles 2, 3, 5, 7, 9, 10, 12, 13, 14, 16, 17, 23, 24 and 26, of the International Covenant on Civil and Political Rights. They are represented by counsel, Mr. Mauro Gagliardi and Mr. Acquaro.

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* The following members of the Committee participated in the examination of the present communication: Mr. Abdelfattah Amor, Mr. Nisuke Ando, Mr. Prafullachandra Natwarlal Bhagwati, Ms. Christine Chanet, Mr. Franco Depasquale, Mr. Maurice Glèlè Ahanhanzo, Mr. Walter Kälin, Mr. Ahmed Tawfik Khalil, Mr. Rajsoomer Lallah, Mr. Rafael Rivas Posada, Sir Nigel Rodley, Mr. Martin Scheinin, Mr. Hipólito Solari Yrigoyen, Ms. Ruth Wedgwood, Mr. Roman Wieruszewski and Mr. Maxwell Yalden.

The texts of two separate individual opinions signed by Committee members, Mr. Nisuke Ando and Ms. Ruth Wedgwood are appended to the present document.

1.2 An interim measures request to prevent the deportation of Mr. Madafferi, which was submitted at the same time as the initial communication, was at first denied by the Committee's Special Rapporteur on new communications. However, in light of the psychological report provided, the Special Rapporteur, in the exercise of his mandate, decided to include the following phrase in the note transmitting the communication to the State party with the request for information on admissibility and merits, "The Committee wishes to draw the attention of the State party to the psychological impact of detention upon [Mr. Madafferi], and the possibility that a deportation, if implemented while the communication is before the Committee, may violate the State party's obligations under the Covenant."[1]

The facts as submitted by the authors

2.1 On 21 October 1989, Francesco Madafferi arrived in Australia on a tourist visa, which was valid for six months from the date of entry. He came from Italy, where he had served a two-year prison term and was released in 1986. On entering Australia, Mr. Madafferi had no outstanding criminal sentence or matters pending in Italy.

2.2 After April 1990, Mr. Madafferi became an unlawful non-citizen. On 26 August 1990, he married Anna Maria Madafferi, an Australian national. He believed that his marriage had automatically granted him residence status. The couple had four children together, all born in Australia. Mr. Madafferi's extended family are all residents in Australia.

2.3 In 1996, having been brought to the attention of the Department of Immigration and Multicultural Affairs (hereinafter "DIMIA"), Mr. Madafferi filed an application for a spouse visa to remain permanently in Australia. In this application, he disclosed his past convictions and included details of sentences handed down, in absentia, in Italy which only became known to him following his initial interview with the immigration officers. Extradition was never sought by the Italian authorities.

2.4 In May 1997, DIMIA refused the application for a spouse visa, as he was considered to be of "bad character", as defined by the Migration Act, in light of his previous convictions. This decision was appealed to the Administrative Appeals Tribunal (hereinafter referred to as "AAT").

2.5 On 7 June 2000, and after a two-day hearing, the AAT set aside the decision under review and remitted the matter to the Minister of DIMIA (hereinafter "the Minister") for reconsideration in accordance with a direction that Mr. Madafferi "not be refused a visa on character grounds solely on the basis of the information presently available …".[2] In July 2000, rather than reconsidering the matter in accordance with the direction of the AAT, the Minister gave notice of his intention under a separate section of the Migration Act 1958 - subsection 501A - to refuse Mr. Madafferi's request for a visa.

2.6 In August 2000, the Italian authorities, on their own motion, extinguished part of the outstanding sentences and declared that the remainder of the outstanding sentences would be extinguished in May 2002.[3] According to the authors, the Minister did not take these actions of the Italian authorities into account.

2.7 On 18 October 2000, the Minister used his discretionary power, under subsection 501A, to overrule the AAT decision and refused Mr. Madafferi a permanent visa. On 21 December 2000, following an application by Mr. Madafferi's lawyer, the Minister gave his reasons, claiming that since Mr. Madafferi had prior convictions and an outstanding term of imprisonment in Italy, he was of "bad character" and that therefore it would be in the "national interest" to remove him from Australia. According to the authors, the Minister failed to make proper enquiries with the Italian authorities and relied incorrectly on the assumption that Mr. Madafferi had an outstanding sentence of over four years. Further clarification was asked of the Minister and provided by him in January 2001. On 16 March 2001, Mr. Madafferi surrendered himself to the authorities and was placed in the Maribyrnong Immigration Detention Centre in Melbourne for an indefinite period.

2.8 On 18 May 2001, the Federal Court dismissed an application for judicial review of the Minister's decision. On 5 June 2001, this decision was appealed to the Full Court of the Federal Court. On 13 November 2001, the Full Federal Court heard the appeal and reserved its decision. On 31 January 2002, Mr. Madafferi was advised that one of the three judges of the Full Federal Court had fallen ill and would not be able to hand down his judgement. Mr. Madafferi chose to have a reconstituted court decide the appeal on the papers rather than the two remaining judges handing down their decision. On 17 July 2002, the reconstituted Full Federal Court, dismissed the appeal.

The complaint

3.1 The authors claim that as Mrs. Madafferi does not intend to accompany her husband to Italy if he is removed, the rights of all the authors, particularly the children, will be violated as the family unit will be split up. It is claimed that such a separation would cause psychological and financial problems for all concerned, but more particularly for the children, considering their young ages.

3.2 The authors claim that the decision of the Minister was arbitrary in overturning the decision of the AAT without any new information and without due consideration of the information, facts and opinion of the presiding judge. It is claimed that the Minister abused his discretion and failed to afford procedural fairness to Mr. Madafferi's case. They claim that his decision was politically driven by "the media's contempt for Mr. Madafferi and other members of his family". In this regard, the authors also stress that Mr. Madafferi has never been convicted of an offence in Australia.

3.3 In addition, the authors claim that the detention centre in which Mr. Madafferi was held does not rise to the health standards and humane environment even accorded to serious criminal offenders. It is also claimed that Mr. Madafferi's rights have been violated by denying him other alternative detention measures like home detention or alternate home arrest which would allow him to continue to be with his family, particularly in light of the birth of his last child, pending resolution of his immigration status. In this regard it is claimed that Mr. Madafferi was not allowed to attend the birth of his fourth child, born on 17 July 2001.

The State party's submission on admissibility and merits

4.1 By submission of March 2002, the State party commented on the admissibility and merits of the communication. It submits that the entire communication is inadmissible insofar as it purports to be lodged on behalf of Mrs. Madafferi and the Madafferi children, as they have not given their authority to do so. It submits that the entire communication is inadmissible for failure to exhaust domestic remedies as, at the time of its submission, the Full Court of the Federal Court had not yet handed down its decision and the authors still had the option of appealing a negative decision by this court to the High Court. In addition, it submitted that the authors had not availed themselves of the remedy of habeas corpus, to review the lawfulness of Mr. Madafferi's detention, nor did they lodge a complaint with the Human Rights and Equal Opportunities Commission.

4.2 It submits that the entire communication is inadmissible for failure to substantiate any of the allegations. With the exception of the allegations that articles 9, paragraph 1 and 10, paragraph 1, have been violated in relation to Mr. Madafferi, all of the allegations contained in the communication are inadmissible on the basis of incompatibility with the Covenant. A number of the allegations are inadmissible in relation to certain members of the family as they cannot be considered victims of the alleged violations.

4.3 On the merits, the State party submits that the authors failed to provide sufficient pertinent evidence to permit an examination of the merits of the alleged violations. As to a possible violation of article 7, the State party submits that the treatment of Mr. Madafferi and its effects on the other authors did not amount to severe physical or mental suffering of the degree required to constitute torture, but was lawful treatment in accordance with the State party's immigration laws. As to the psychological assessments of the authors, it submits that whilst there is evidence that Mr. Madafferi and the Madafferi children are suffering emotionally as a result of his detention and proposed removal, they do not amount to evidence of a violation of article 7, as they do not document suffering of a sufficient severity caused by factors beyond the incidental effects of detention and its inherent separation from the rest of the family. As evidence, it submits a copy of a medical report, dated 20 August 2001, which concludes that whilst Mr. Madafferi is suffering a range of stress-related symptoms, these are in the mild to moderate range and consistent with what would be expected given his detention and proposed removal.

4.4 With respect to the alleged violation of article 9, the State party submits that Mr. Madafferi' s detention is lawful and in accordance with procedures established by law, the Migration Act. As he does not hold a visa, he is an unlawful non-citizen under the definition in section 14 of the Migration Act. Under section 189, such unlawful non-citizens in Australia are detained mandatorily. The State party submits that the Minister was entitled to use his discretionary power under the Migration Act not to grant a visa to Mr. Madafferi. His actions in this regard have been challenged throughout the court system and found to be lawful.

4.5 The State party denies that Mr. Madafferi's detention is arbitrary. It submits that detention in the context of immigration is an exceptional measure reserved for people who arrive or remain in Australia without authorization. The aim of immigration detention is to ensure that potential immigrants do not enter Australia before their claims to do so have been properly assessed and found to justify entry. It also provides Australian officials with effective access to those persons for the purposes of investigating and processing their claims without delay, and if those claims are unwarranted, to remove such persons from Australia as soon as possible.

4.6 The State party submits that the detention of people who seek to remain in Australia unlawfully is consistent with the fundamental right of sovereignty, pursuant to which States may control the entry of non-citizens into their territory. Australia has no system of identity cards, or other national means of identification or system of registration which is required for access to the labour market, education, social security, financial services and other services. This makes it more difficult for Australia to detect, monitor and apprehend illegal immigrants in the community, compared to countries where such a system is in place.

4.7 On the basis of past experience, it may reasonably be assumed that if individuals were not detained but released into the community, pending finalization of their status, there would be a strong incentive for them not to adhere to the conditions of their release and to disappear into the community and remain in Australia unlawfully, especially where such individuals have a history of non-compliance with migration laws. The State party's immigration detention policy must also be seen in the broader context of the overall migration programme. All applications to enter or remain in Australia are thoroughly considered, on a case-by-case basis. Although the exhaustion of all legal remedies means that the processing time is extended in some cases, it also ensures that all claimants are assured of a detailed consideration of all the factors relevant to their case. This has occurred in Mr. Madafferi's case. The reasonableness of the State party's mandatory detention provisions was considered by the High Court in *Chu Kheng Lim v. Minister for Immigration and Ethnic Affairs.*[4]

4.8 The State party submits that its migration laws are not arbitrary per se, and that they were not enforced in an arbitrary manner in the case of Mr. Madafferi. Several factors demonstrate that Mr. Madafferi was treated in a reasonable, necessary, appropriate, predictable and proportional manner to the ends sought, given the circumstances of his case. Firstly, he was always treated in accordance with domestic laws. Secondly, the failure of the character test established by section 501A[5] of the Migration Act due to Mr. Madafferi's criminal record, the fact that he twice overstayed his Australian entry permit and his dishonesty when dealing with migration officials meant that it was reasonable and predictable that he would be denied a visa, notwithstanding the fact that he had established a family in Australia. Direction 17 provides directions on, inter alia, the application of the character test.[6]

4.9 Thirdly, the decision of the Minister was based on a full consideration of all relevant issues as evidenced by the extensive reasons and supplementary reasons provided by the Minister for his decision. These issues included: the interests of Mrs. Madafferi and her children; Australia's international obligations; Mr. Madafferi's criminal history; Mr. Madafferi's conduct since arriving in Australia; the interests of maintaining the integrity of the Australian immigration system and protecting the Australian community; the expectations of the Australian community and the deterrent effect of a decision to deny Mr. Madafferi a visa.

4.10 Fourthly, Mr. Madafferi unsuccessfully sought to challenge the Minister's decision in the Federal Court, which found that the Minister's decision did not involve an error of law, improper exercise of power or bias, was carried out in accordance with the *Migration Act* and was not based on any lack of evidence. Fifthly, he was detained in order to facilitate his removal from the State party and has remained there only whilst he has challenged that removal order. Sixthly, his detention was the subject of review by the Federal Court and was not overturned. It has recently been agreed that Mr. Madafferi be approved for home detention, subject to approval of the practical aspects of such detention.

4.11 The State party contests that it has violated article 10 with respect to the conditions of detention. It provides a statement from the Detention Services Manager for Victoria (where the detention centre Mr. Madafferi was detained is located) to demonstrate that Mr. Madafferi was treated humanely whilst detained, with the level of services provided more than adequate to satisfy his basic needs.

4.12 In relation to the allegation that Mr. Madafferi was not able to be present at the birth of Antonio Madafferi, it is stated that permission was granted for Mr. Madafferi to be present at the birth as long as he was supervised. It was Mrs. Madafferi who stated that she did not want Mr. Madafferi to be present at the birth under such circumstances. The State party acknowledges that there was a delay in permitting Mr. Madafferi to visit the hospital, but that this was rectified speedily and an extra visit allowed as a result. The State party submits that requiring Mr. Madafferi to be supervised in such circumstances was prudent to ensure that he did not abscond.

4.13 The State party submits that Mr. Madafferi is not lawfully in its territory and this fact negates any allegation that he has been the victim of a violation of article 12, paragraph 1, of the Covenant. The operation of article 12, paragraph 3, which establishes a number of exceptions to the rights established by article 12, paragraph 1, means that Mr. Madafferi's detention does not amount to a denial of the right to liberty of movement or freedom to chose his residence, in contravention of article 12, paragraph 1.

4.14 As to a possible violation of article 12, paragraph 4, the State party submits that Mr. Madafferi's link with Australia is insufficient to assert that it is his own country for the purposes of this provision. None of the situations that were identified by the Committee in *Stewart v. Canada*,[7] as giving rise to special ties and claims in relation to a country so that a non-citizen cannot be considered to be a mere alien, exist in relation to Mr. Madafferi and his relationship with Australia. He has not been stripped of his nationality in violation of international law. Mr. Madafferi did not seek to acquire a right to stay in the State party in accordance with Australia's immigration laws, despite the fact that the State party has well established mechanisms for applying for Australian nationality and does not place unreasonable impediments on the acquisition of Australian citizenship.

4.15 On article 13, the State party submits that Mr. Madafferi is not lawfully in Australia, that the decision to expel him is in accordance with Australian law, and that he had numerous opportunities to have this decision reviewed.

4.16 As to the claim of a violation of article 14, paragraph 1, the State party refers to the Committee's decision in *Y.L. v. Canada*,[8] where the Committee considered the definition of a "suit at law", and adopted a two-pronged interpretation, examining the nature of the right in question and the forum in which the question must be adjudicated. In relation to the nature of the right in question, the State party refers to decisions of the European Court of Human Rights (ECHR) to demonstrate that the right to a residence permit does not fall within the rights established by article 6, of the ECHR, which is very similar to article 14 of the Covenant.[9] An administrative decision at first instance to deny a visa does not amount to a "suit at law" for the purposes of this provision. Such a decision cannot be characterized as a determination of rights and obligations in a "suit at law", as it does not involve legal proceedings brought by one person to determine their rights as against another, but rather an administrative decision where one person determines the rights of another person pursuant to a statute. A decision on whether to allow a person to enter and/or remain in its territory is a matter for the State concerned. As to the forum in which the right is adjudicated upon, the State party reaffirms that an administrative decision at first instance to deny a visa does not amount to a "suit at law".

4.17 As to article 17, the State party submits that requiring one member of a family to leave Australia while the other members are permitted to remain, does not necessarily involve "an interference" with the family life of the person removed or the people who remain.[10] It submits that article 17 is aimed at the protection of individual privacy and the interpersonal relationships within a family that derive from this right to privacy. The detention and proposed removal of Mr. Madafferi does not interfere with the privacy of the Madafferi family as individuals or their relationships with each other. The proposed removal is not aimed at affecting any of the relations between any members of the family and the State party will not obstruct the maintenance and development of the relationships between the members of the family. The detention and proposed removal of Mr. Madafferi is solely aimed at ensuring the integrity of the State party's immigration system. In its view, decisions about whether the other family members will continue their lives in Australia or travel with Mr. Madafferi to Italy or any other country are for the family to make. It points out that only Mr. Madafferi is subject to removal; the Madafferi children can remain in Australia with Mrs. Madafferi. Considering the young ages of the children and the fact that both of their parents are of Italian ancestry, they would be able to successfully integrate into Italian society, if Mr. Madafferi is joined by other members of his family. In this context, the State party notes the advice of the authors that Mr. Madafferi is not required to serve his outstanding Italian prison sentences when he returns to Italy. Once he is removed from Australia, it is submitted that he will be able to make an offshore application for a visa permitting him to return.

4.18 If the Committee is of the view that the State party's conduct in relation to Mr. Madafferi constitutes an "interference" with the Madafferi family, such interference would be neither "unlawful" nor "arbitrary". Reference is made to the fact that the Covenant recognises the right of States to undertake immigration control.

4.19 The State party contests the claim of a violation of article 23, and argues that its obligation to protect the family does not mean that it is unable to remove an unlawful non-citizen just because that person has established a family with Australian nationals. Article 23 must be read in light of the State party's right, under international law, to control the entry, residence and expulsion of aliens.[11] In accordance with this right, the Covenant allows the State party to take reasonable measures to control migration into Australia, even where such measures may involve removal of a parent. The situation whereby Mr. Madafferi can only be with his family if they travel to Italy would be brought about by Mr. Madafferi's conduct rather than by the State party's failure to take steps to protect the family unit. These submissions show that the decision to deny Mr. Madafferi a visa was made in accordance with Australian law and after a consideration of the impact of the decision on, among other things, the Madafferi family.

4.20 The State party notes that the allegation that article 24 was violated appears to be solely based on the fact that it is proposed to remove Mr. Madafferi from Australia. It submits that this action would not amount to a failure to provide protection measures that are required by the Madafferi children's status as minors. One of the factors considered by the Minister in making the decision to deny Mr. Madafferi a visa was the "best interest" of the Madafferi children. Any long-term separation of Mr. Madafferi from the Madafferi children will occur as a result of decisions made by Mr. and Mrs. Madafferi, not the result of State party actions. The authors have not provided any evidence that the children cannot be adequately protected by Mrs. Madafferi, should they remain in Australia or that there are any obstacles to the children continuing a normal life in Italy.

4.21 The State party indicates that the alleged violation of article 26 appears to relate to the guarantee of equality before the law by the Minister in denying Mr. Madafferi a visa. The State party refutes this claim and refers to its arguments on article 9; it submits that the Minister's decision was necessary, appropriate, predictable and proportional and argues that: the decision was lawful; that Mr. Madafferi failed the character test; that he was permitted to make submissions to the Minister prior to him making his decision; that the Minister provided reasons for his decision; and that his decision was judicially reviewed and found not to involve any error of law, improper exercise of power or bias, that it was in accordance with the Migration Act and not based on any lack of evidence.

4.22 As to violations of articles 2, 3, 5, 14, paragraph 2 to 7, and 16, the State party provides detailed arguments dismissing these claims on grounds of inadmissibility and lack of merit.

Interim measure request

5.1 On 16 September 2003, the authors informed the secretariat that the State party intended to deport Mr. Madafferi on 21 September 2003, requested interim measures of protection to prevent his deportation. They further requested a direction from the Committee that he be transferred to home detention.

5.2 The authors provide an update on the factual situation. On 7 February 2002, on the basis of Mr. Madafferi's deteriorating psychological state and the effect the separation was having on the other members of the family, the Minister directed that Mr. Madafferi be released into home detention. This was done on 14 March 2002. In home detention, he continued to suffer mental ill health and was visited by doctors, psychiatrists and counsellors, at his own expense. The symptoms that had developed by the time he was released into home detention did abate, but he continued to suffer from symptoms of mental ill health during the home detention arrangement.

5.3 On 20 June 2003, special leave to the High Court to review the Minister's ability to intervene and to set aside the decision of the AAT was denied. On 25 June 2003, DIMIA terminated the home detention agreement due to the increased risk that Mr. Madafferi would abscond following the High Court decision five days earlier, which meant that domestic remedies were exhausted. On the same day, Mr. Madafferi was returned to immigration detention at Maribyrnong. A constitutional writ issued by the author was dismissed by the High Court on 25 June 2003.

5.4 Mr. Madafferi's return to detention is described as comparable to an "army style raid", during which 17 armed Australian Federal Police arrived unannounced in an escort van accompanied by two other vehicles of the Australian Federal Police. Mr. Madafferi surrendered himself without a struggle. Mrs. Madafferi was terrified for the safety of her husband, as she thought he was being removed from Australia. The two younger children who also witnessed the event suffered from eating disorders for weeks thereafter. The authors claim that this action by the authorities was unwarranted and disproportionate to the circumstances of the case, particularly in the light of Mr. Madafferi's compliance with all the conditions of home detention over a 15-month period.

5.5 Prior to the termination of home detention, medical evidence was presented to DIMIA, at its request, in support of the contention that home detention ought to continue, since the medical grounds for which the Minister had originally directed detention continued to exist or would likely reappear if the author were to be returned to Immigration Detention at Maribrynong. Thus, the authors argue, the State party acted against its own medical and psychiatric advice in terminating home detention.[12]

5.6 On 22 June 2002, the Italian authorities notified Mr. Madafferi that they had extinguished his outstanding sentences and cancelled his arrest warrant. In June 2003, Mr. Madafferi requested the Minister to revisit his decision to refuse Mr. Madafferi a spouse visa in light of this information. The Minister advised that he had no legal basis to revisit the decision; this was confirmed by the Federal Court on 19 August 2003; that decision is currently on appeal to the Full Court.

5.7 On 18 September 2003, in light of the materials provided, the fact that deportation was scheduled for 21 September 2003, and that consideration of the communication was scheduled for the Committee's seventy-ninth session (October 2003), the Special Rapporteur, acting under rule 86 of the Committee's rules of procedure, requested the State party not to deport Mr. Madafferi until the conclusion of this session. He also requested the State party to provide at its earliest convenience information on transferral to home detention or other measures taken to alleviate the risk of serious injury, including serious self-harm, that had been identified to exist, including by the State party's authorities, in the event of Mr. Madafferi's continued immigration detention.

5.8 By submission of 17 October 2003, the State party submitted that it would accede to the Special Rapporteur's request not to deport Mr. Madafferi until its consideration at the Committee's seventy-ninth session. It set out the facts of the case as submitted by the authors and added that Mr. Madafferi was removed from home detention having exhausted domestic remedies, in accordance with section 198 of the Migration Act, which requires that unlawful non-citizens should be removed as soon as practicable.

5.9 As to the measures taken to alleviate the risk of further injury, the State party refers to a medical report, dated 26 September 2003, in which the treatment received by Mr. Madafferi since returning to the detention centre is summarized. This includes daily consultations with the Centre Nurse and Counsellor and regular consultations with the South West Mental Health Services. Mr. Madafferi's mental state continued to decline, however, to the extent that he was admitted to a psychiatric hospital on 18 September 2003, and declared unfit to travel abroad.[13]

5.10 On 7 November 2003, the Special Rapporteur, acting under rule 86 of the Committee's rules of procedure, extended the rule 86 request to the State party until the eightieth session, in light of further comments received from the authors and a request from the State party to comment thereon.

The author's comments on the State party's submission

6.1 By submission of 30 September 2003, the authors provide an update on the facts of the communication and comments on the admissibility and merits. Mr. Madafferi's transfer to home detention, which lasted from 14 March 2002 to 25 June 2003, was "on an actual cost recovery basis to the department". The estimated cost was $16,800 per month which was paid in advance and after the placement of a $50,000 bond, the author was released into home detention on 14 March 2002. The authors paid the initial instalment payment of $16,800 and a further $16,800. Since then, no further payments have been made as the family have been unable to raise any more funds. The authors claim that they were under duress to accept the financial conditions of home detention, against the advice of their lawyers, as the only way in which they could be reunited. They also claim that the obligation to procure home detention as an alternative form of immigration detention was a matter incumbent on the State party to procure given the deteriorating health of Mr. Madafferi and not for the authors to pay as a method of stabilizing his medical condition.

6.2 The authors continue to allege violations of all the original articles claimed (as per paragraph 1) and provide clarification on the claims of articles 9, 10, 12, 13, 17, 23 and 24. As to article 9, they submit that this claim only relates to Mr. Madafferi. They argue that although the decision to detain him is lawful, it was arbitrary, being neither "reasonable" nor "necessary" in all the circumstances of this case. There is no evidence of flight risk, since the very nature of the application was that Mr. Madafferi sought to remain with his family in Australia. Neither was there evidence that he had committed an offence since arriving in Australia. He has no remaining attachments to Italy but has lived in Australia for 15 years where he has a family, business (retail fruit shop), a mortgage and a tax number. He was the sole breadwinner of his family; should he be returned to Italy, there is no likelihood of him gaining any meaningful employment sufficient to maintain and support his family. In these circumstances, his detention is disproportionate and unwarranted. By reason of his detention, Mrs. Madafferi is denied social security benefits as a single mother, as the domestic law does not consider the parties legally separated. Neither is she eligible for an invalid or carer's pension, on the basis of his inability to work.

6.3 Alternative forms of detention, prior to his detention at the Maribyrnong Immigration Detention Centre were not considered by the State party. Home detention was only implemented following the emotional distress to Mr. Madafferi and only for a limited period. No reasons have been provided by the State party on why home detention or a similar form report style of detention was not considered or implemented at any other period. When home detention was finally directed by the Minister the DIMIA took in excess of eight weeks to implement the direction.

6.4 As to the State party's argument that Mr. Madafferi overstayed his visa on two occasions, the authors argue that he was 15 years old the first time subject to the care and guidance of his father, and thus had no control over his departure. The second overstay resulted from his incorrect belief that by marrying an Australian citizen, he would be entitled automatically to remain in Australia. The authors highlight that his entry into Australia occurred prior to the introduction of the character strengthening provision (Direction 17) of domestic legislation.[14]

6.5 According to the authors, procedural fairness was not afforded to Mr. Madafferi, since he had a reasonable expectation that on the determination of his application for a spouse visa before the AAT, that the AAT would finally determine his application for a spouse visa. The Minister did not appeal the decision of the AAT nor did DIMIA reconsider the decision in accordance with the directions of the AAT. In setting aside the AAT decision and recommencing the process of review Mr. Madafferi was not afforded procedural fairness. It is submitted that but for the Minister's further intervention and decision of 18 October 2000, it was reasonable to expect that Mr. Madafferi's application for a spouse visa would be granted on reconsideration by the DIMIA.

6.6 The authors clarify that the allegation of a violation of article 10, paragraph 1, of the Covenant relates only to Mr. Madafferi. Prolonged detention of Mr. Madafferi at Maribyrnong was not appropriate as this facility is considered a short-term facility only. The facilities have been overstretched and overcrowding has been frequent. The anxiety and stress of confinement of detention is claimed to be a strain on the habits, religious practices and customs of detainees. The authors submit that conditions of detention centres in Australia are well-documented.

6.7 The authors point to the following episodes which are not exhaustive but are illustrative of the violation of the author's rights under this provision. Firstly, the failure to allow the author to attend the birth of his fourth child since a detention officer stated that a taxi could not be organized in time despite the fact that four hours prior notice was given to DIMIA. Following the birth, the attendance of security guards at the labour ward intimidated Mrs. Madafferi and resulted in the visit being terminated. Secondly, the failure of DIMIA to allow the author more than one visit of his wife and child at the hospital and on the arrival of the child at home. The author concedes that the State party allowed a further visit at the hospital, however this was under heavy escort of guards by the State party.

6.8 Thirdly, the failure of the DIMIA to consent to a more liberal arrangement of home detention to allow the family to participate and interact as a family unit for the benefit of the children. Mr. Madafferi was either prevented from attending family functions or escorted by guards, attracting public attention. This only served to further highlight the public humiliation of the author and his family in a public place. Fourthly, the manner in which home detention was terminated by DIMIA on 25 June 2003 by the use of unnecessary and disproportionate force. Fifthly, the neglect and/or refusal to act on medical advice and warnings of the State party's own medical and psychological doctors that the continued immigration detention of Mr. Madafferi had a severe impact on his mental health. He was not treated for mental health problems for a prolonged period. His admission as an involuntary patient in a psychiatric hospital could have been avoided if the warnings were acceded to.

6.9 The authors contend that article 12, paragraph 1, does apply to the circumstances of this case and nothing in paragraph 3 of the article ought to restrict the application of paragraph 1 to the facts of this case.[15] The authors submit the following facts to demonstrate that Mr. Madafferi has created links to Australia which possess the characteristics necessary to call Australia "his own country" within the meaning of article 12, paragraph 4: both of his parents in Italy have passed away; his grandfather arrived and settled in Australia in 1923 and remained there until he passed away; his father arrived in Australia in the 1950's and resettled back in Italy on retirement, with an Australian pension; he has not returned to Italy; he holds an Australian driver's licence, a taxation file number, a national Medicare health card, and operates a retail business employing staff and paying taxes relevant to the business; he held an Italian passport which he allowed to expire, renounced his residency within his town of birth and is no longer registered as domiciled in Italy; the Italian authorities are aware and have noted that he is a resident of Australia; and Mr. Madafferi's brothers and sister have all formally renounced their Italian citizenship. In addition, the authors submit that Mr. Madafferi has committed no crimes in Australia. As to the allegation of "non-disclosure of offences imposed in absentia in Italy", the authors submit "were initially unbeknown to Mr. Madafferi at the time of the first interview with immigration officers who raised the issue".

6.10 On article 13, the authors argue that by refusing Mr. Madafferi a spouse visa, the Minister in part relied on the fact that an outstanding warrant for Mr. Madafferi's arrest existed in Italy. In June 2002, the warrant for his arrest was recalled following the extinguishment of the outstanding sentences in Italy. The authors claim a violation of article 13, as the Minister refused to reconsider his decision in light of the changed circumstances, stating that he had no legal basis to do so.

6.11 As to alleged violations of articles 17, 23 and 24 (relating to all the authors), it is submitted that if Mr. Madafferi is removed from Australia, Mrs. Madafferi and the children will remain in Australia. Such a forced physical separation would be forced on them by the State party thus constituting an interference with the family life and/or unit of the family by the State party. There is no suggestion that the marriage and the family bond is not genuine and strong, and there is medical evidence demonstrating that all family members would be affected and saddened by separation.

6.12 As to the argument that Mrs. Madafferi and the children should follow Mr. Madafferi, the authors argue that this is an emotive argument, not a legal one. They are Australian nationals and are entitled to remain in Australia; their residency is protected by other articles of the Covenant. If they were to follow Mr. Madafferi to Italy, they would find it difficult to integrate. The children are already experiencing emotional and speech difficulties given their involvement in the present case. Such problems will be compounded in Italy, where their ability to communicate is restricted. Mrs. Madafferi and the Madafferi children have never been to Italy; only Mrs. Madafferi speaks a little Italian. They have no extended family members in Italy.

6.13 It is argued that if the family remain in Australia without Mr. Madafferi, Mrs. Madafferi will be unable to cope with the children. In autumn 2003, she suffered an acute nervous breakdown and was admitted to Rosehill Hospital Essendon (Victoria) for five days. The pressure of the present case and the difficulties in raising and attending to four young children on her own has been and continues to be overwhelming.

6.14 The authors argue that Mr. Madafferi's removal to Italy would be for an indefinite period with no real prospect of return to Australia, even on a temporary visit. They argue that the "character" issue is an essential criterion to any spouse visa application whether made on or offshore. Inability to meet this criterion will result, in practical terms, in Mr. Madafferi being unsuccessful in every visa application to re-enter Australia. It is submitted that no delegate will have the authority to overrule the Minister's personal ruling made in this case and that it may also be a factor dissuading the AAT from exercising its discretion, should an application be refused at first instance and the decision be appealed.

State party's supplementary comments

7.1 By submission of 6 April 2004, the State party submits that new counsel in the case has not been authorized by the authors and that therefore the communication is inadmissible *ratione personae*. It submits that it has no obligation, as argued by the authors, to procure home detention as an alternative form of detention, given Mr. Madafferi's medical condition and that alternative detention is only permitted in exceptional circumstances. As to the costs of home detention, it is argued that Mr. Madafferi accepted the costs of such detention and at all stages the State party took reasonable steps to provide him with appropriate care.

7.2 It submits that it has not received any evidence that any sentences or convictions have been extinguished or expunged from Mr. Madafferi's criminal record, and the fact that he had incurred criminal convictions and sentences would be relevant to any decision relating to the granting of a visa.

7.3 As to the author's claim under article 9 that Mr. Madafferi is a low flight risk, the State party refers to correspondence from DIMIA to Mr. Madafferi's migration agent, dated 25 June 2003 regarding the termination of home detention, in which it is stated that now domestic remedies have been exhausted the risk of flight is high. As to the claim that the Minister decided the matter afresh rather than to reconsider it as directed by the AAT in its decision of 7 June 2000, the State party acknowledges that the Minister was prima facie under an obligation to so reconsider. However, it reiterates that some decisions of the AAT may be set aside by the Minister under section 501A of the Migration Act 1958 (footnote 11), and that the decision of 18 October 2000 was valid.

7.4 As to the claim that Mr. Madafferi could have reasonably expected that the AAT would determine his application for a spouse visa, the State party submits that it is not within the jurisdiction of the AAT to determine his eligibility for such a visa, as its consideration was limited to the refusal of the spouse visa on character grounds and its direction on remittal related solely to character.

7.5 The State party denies that the Maribyrnong Immigration Detention Centre is classified as a short-term facility. It was considered an appropriate facility in this case as it allowed easy access by Mr. Madafferi's family and lawyer. As to the claim that the State party should have consented to a more liberal form of home detention, the State party submits that Mr. Madafferi was free to receive any visitors in his family home, and special arrangements were made for him to attend a number of family functions including a wedding, the confirmation receptions for two of his children and a family engagement. As to the allegation that home detention was terminated with unreasonable force, it submits that an officer from DIMIA attended Mr. Madafferi's house with eight Australian Federal Police Officers and two Australasian Corrections Management Officers. The visit was reported to have lasted eight minutes. Meeting Mr. Madafferi in the driveway, the DIMIA officer informed him that he was now in DIMIA's custody and required to return to the Maribyrnong Immigration Detention Centre, Melbourne.

Mr. Madafferi was escorted to a vehicle parked in the street. It is the recollection of the DIMIA officer that the AFP officers did not display arms. On 19 January 2004, the Deputy Director of Clinical Services at the Weeribee Mercy Mental Health Program reported that Mr. Madafferi is still not fit to be discharged from hospital.

Issues and proceedings before the Committee

Consideration of admissibility

8.1 Before considering any claim contained in a communication, the Human Rights Committee must, in accordance with rule 87 of its rules of procedure, decide whether or not it is admissible under the Optional Protocol to the Covenant.

8.2 The Committee has ascertained, in accordance with article 5, paragraph (a), of the Optional Protocol, that the same matter is not being examined under another international procedure of international investigation or settlement.

8.3 On the question of standing and the State party's argument that the authors' counsel have no authorization to represent them, the Committee notes that it has received written confirmation of one representative's authority to act on the authors' behalf, who in turn submitted further submissions prepared by the authors' domestic legal representatives. Thus, the Committee concludes that both of the authors' representatives have standing to act on their behalf and the communication is not considered inadmissible for this reason.

8.4 As to the State party's argument that domestic remedies have not been exhausted, as the administrative remedy of submitting a complaint to the Human Rights and Equal Opportunity Commission was not pursued by the authors, the Committee invokes its prior jurisprudence[16] that any decision handed down by this body would only have recommendatory, rather than binding, effect, and thus cannot be described as a remedy which would be effective within the meaning of article 5, paragraph 2 (b), of the Optional Protocol.

8.5 As to the claim that domestic remedies have not been exhausted, as Mr. Madafferi failed to apply for habeas corpus and that the appeals of the Full Federal Court and High Court on the lawfulness of the Minister's decision remained to be considered, the Committee notes that at the time of consideration of this communication, these remedies had been exhausted by the authors.

8.6 As to the claims under articles 2, 3, 12, paragraphs 1 to 3, 14, paragraphs 2 to 7, and 16, the Committee finds that the authors have failed to substantiate, for the purposes of admissibility, how any of their rights have in fact been violated under these provisions. These claims are therefore inadmissible under article 2 of the Optional Protocol. Furthermore, as article 5 of the Covenant does not give rise to any separate individual right, the claim made under that provision is incompatible with the Covenant and hence inadmissible under article 3 of the Optional Protocol.

8.7 As to the claims that the Minister did not afford Mr. Madafferi procedural fairness either in the application of his discretionary power or in his refusal to reconsider Mr. Madafferi's visa request, the Committee notes that the authors did not link these issues to any specific articles of the Covenant. In addition, the Committee notes that the lawfulness of the Minister's decision to invoke his discretionary powers was reviewed judicially both by the Federal Court and Full Federal Court, and that the issue of whether the Minister could revisit such a decision was similarly reviewed by the Federal Court. Thus, although the Committee is of the view that the application of this procedure may raise issues under articles 14, paragraph 1 and 13 of the Covenant, it finds that the authors have not sufficiently substantiated any such claims for the purposes of admissibility. Accordingly, the Committee finds this claim inadmissible, under article 2 of the Optional Protocol. However, the Committee does find that the claim of procedural unfairness in the application of the Minister's discretionary power does raise an issue under article 26 which has been sufficiently substantiated for the purposes of admissibility. The Committee concludes, therefore, that this claim is admissible in respect of article 26 of the Covenant.

8.8 As to any issues that may arise with respect to the period Mr. Madafferi was in home detention, including his obligation to pay for the security services provided by the State party and the State party's alleged failure to monitor his mental health during this period, it appears from the documentation provided that the terms of Mr. Madafferi's home detention were contractually based and approved by the authors. From a review of this agreement, it appears that the conditions included the authors' obligation to pay for medical costs, and that this was not a term of the agreement that was challenged in the domestic courts. In fact, the only issue arising from this contract that was challenged in the domestic courts related to the amount owed by the authors. The legality per se of the contract was not challenged. For this reason, any issues that may arise under the Covenant with respect to the matter of contractual terms on home detention are inadmissible, for failure to exhaust domestic remedies, under article 5, paragraph 2 (b), of the Optional Protocol.

8.9 The Committee considers that the authors' remaining claims under articles 9, 12, paragraph 4, 10, paragraph 1 and 7, as they relate to Mr. Madafferi only; and articles 17, 23 and 24, relating to all the authors, are admissible and proceeds to their examination on the merits.

Consideration of merits

9.1 The Human Rights Committee has considered the present communication in light of all the information made available to it by the parties, as provided in article 5, paragraph 1, of the Optional Protocol.

9.2 As to the claim of a violation of article 9, relating to the author's detention, the Committee notes that the author has been detained since 16 March 2001, albeit for part of the period at home. It recalls its jurisprudence that, although the detention of unauthorized arrivals is not per se arbitrary, remand in custody could be considered arbitrary if it is not necessary in all the circumstances of the case: the element of proportionality becomes relevant. It notes the reasons behind the State party's decision to detain Mr. Madafferi and cannot find that his detention was disproportionate to these reasons. It also notes that although Mr. Madafferi did begin to suffer from psychological difficulties while detained at the Maribynong Immigration Centre until March 2002, at which point and on the advice of doctors, the State party removed him to home detention, he had not displayed any signs of such psychological problems on arrival at the detention centre one year earlier. Thus, although it is a matter of concern to the Committee now, after the events, that the detention of Mr. Madafferi apparently greatly contributed to the deterioration of his mental health, it cannot expect the State party to have anticipated such an outcome. Accordingly, the Committee cannot find that the State party's decision to detain Mr. Madafferi from 16 March 2001 onwards, was arbitrary within the meaning of article 9, paragraph 1, of the Covenant.

9.3 As to Mr. Madafferi's return to Maribyrnong Immigration Detention Centre on 25 June 2003, where he was detained until his committal to a psychiatric hospital on 18 September 2003, the Committee notes the State party's argument that as Mr. Madafferi had by then exhausted domestic remedies, his detention would facilitate his removal, and that the flight risk had increased. It also observes the author's arguments, which remain uncontested by the State party, that this form of detention was contrary to the advice of various doctors and psychiatrists, consulted by the State party, who all advised that a further period of placement in an immigration detention centre would risk further deterioration of Mr. Madafferi's mental health. Against the backdrop of such advice and given the eventual involuntary admission of Mr. Madafferi to a psychiatric hospital, the Committee finds that the State party's decision to return Mr. Madafferi to Maribyrnong and the manner in which that transfer was affected was not based on a proper assessment of the circumstances of the case but was, as such, disproportionate. Consequently, the Committee finds that this decision and the resulting detention was in violation of article 10, paragraph 1, of the Covenant. In the light of this finding in respect of article 10, a provision of the Covenant dealing specifically with the situation of persons deprived of their liberty and encompassing for such persons the elements set out generally in article 7, it is not necessary to separately consider the claims arising under article 7.

9.4 The Committee notes the authors' claim that Mr. Madafferi's rights were violated under articles 10, paragraph 1, and 7 also, on the grounds of his conditions of detention, while detained in the detention centre; his alleged ill-treatment including the events surrounding the birth of his child; and, in particular, the State party's failure to address the deterioration of his mental health and to take appropriate action. The Committee recalls that Mr. Madafferi spent a first period in the detention centre between 16 March 2001 and March 2002, and was released into home detention after a decision of the Minister in February 2002, on the basis of medical evidence. Although the Committee considers it unfortunate that the State party did not react more expeditiously in implementing the Minister's decision, which the State party has acknowledged took six weeks, it does not conclude that such delay in itself violated any of the provisions of the Covenant. Equally, the Committee does not find that the conditions of Mr. Madafferi's detention or the events surrounding the birth of his child or return into detention, amount to a violation of any of the provisions of the Covenant beyond the finding already made in the previous paragraph.

9.6 As to whether Mr. Madafferi's rights under article 12, paragraph 4, of the Covenant were violated by being arbitrarily deprived of his right to leave his own country, the Committee must first consider whether Australia is indeed Mr. Madafferi's "own country" for the purposes of this provision. The Committee recalls its jurisprudence in the case of *Stewart v. Canada*, that a person who enters a State under the State's immigration laws, and subject to the conditions of those laws, cannot normally regard that State as his "own country", when he has not acquired its nationality and continues to retain the nationality of his country of origin. An exception might only arise in limited circumstances, such as where unreasonable impediments are placed on the acquisition of nationality. No such circumstances arise in the present case, and neither are the other arguments advanced by the authors sufficient to trigger the exception. In the circumstances, the Committee concludes that Mr. Madafferi cannot claim that Australia is his "own country", for purposes of article 12, paragraph 4, of the Covenant. Consequently, there cannot be a violation of this provision in the current case.

9.7 As to a violation of article 17, the Committee notes the State party's arguments that there is no "interference", as the decision of whether other members of the Madafferi family will accompany Mr. Madafferi to Italy or remain in Australia, is an issue for the family and is not influenced by the State party's actions. The Committee reiterates its jurisprudence that there may be cases in which a State party's refusal to allow one member of a family to remain in its territory would involve interference in that person's family life. However, the mere fact that one member of the family is entitled to remain in the territory of a State party does not necessarily mean that requiring other members of the family to leave involves such interference.[17]

9.8 In the present case, the Committee considers that a decision by the State party to deport the father of a family with four minor children and to compel the family to choose whether they should accompany him or stay in the State party is to be considered "interference" with the family, at least in circumstances where, as here, substantial changes to long-settled family life would follow in either case. The issue thus arises whether or not such interference would be arbitrary and thus contrary to article 17 of the Covenant. The Committee observes that in cases of imminent deportation the material point in time for assessing this issue must be that of its consideration of the case. It further observes that in cases where one part of a family must leave the territory of the State party while the other part would be entitled to remain, the relevant criteria for assessing whether or not the specific interference with family life can be objectively justified must be considered, on the one hand, in light of the significance of the State party's reasons for the removal of the person concerned and, on the other, the degree of hardship the family and its members would encounter as a consequence of such removal. In the present case, the Committee notes that the State party justifies the removal of Mr. Madafferi by his illegal presence in Australia, his alleged dishonesty in his relations with the Department of Immigration and Multicultural Affairs, and his "bad character" stemming from criminal acts committed in Italy 20 years ago. The Committee also notes that Mr. Madafferi's outstanding sentences in Italy have been extinguished and that there is no outstanding warrant for his arrest. At the same time, it notes the considerable hardship that would be imposed on a family that has been in existence for 14 years. If Mrs. Madafferi and the children were to decide to emigrate to Italy in order to avoid separation of the family, they would not only have to live in a country they do not know and whose language the children (two of whom are already 13 and 11 years old) do not speak, but would also have to take care, in an environment alien to them, of a husband and father whose mental health has been seriously troubled, in part by acts that can be ascribed to the State party. In these very specific circumstances, the Committee considers that the reasons advanced by the State party for the decision of the Minister overruling the Administrative Appeals Tribunal, to remove Mr. Madafferi from Australia are not pressing enough to justify, in the present case, interference to this extent with the family and infringement of the right of the children to such measures of protection as are required by their status as minors. Thus, the Committee considers that the removal by the State party of Mr. Madafferi would, if implemented, constitute arbitrary interference with the family, contrary to article 17, paragraph 1, in conjunction with article 23, of the Covenant in respect of all of the authors, and additionally, a violation of article 24, paragraph 1, in relation to the four minor children due to a failure to provide them with the necessary measures of protection as minors.

9.9 In the light of the Committee's finding of a violation of article 17 in conjunction with articles 23 and 24 of the Covenant, partly related to the Minister's decision to overrule the AAT, the Committee considers that it need not address separately the claim that the same decision was arbitrary, in violation of article 26 of the Covenant.

10. The Human Rights Committee, acting under article 5, paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights, is of the view that the State party has violated the rights of Mr. Francesco Madafferi under articles 10, paragraph 1, of the Covenant. Moreover, the Committee considers that the removal by the State party of Mr. Madafferi would, if implemented, constitute arbitrary interference with the family, contrary to article 17, paragraph 1, in conjunction with article 23, of the Covenant in respect of all of the authors, and additionally, a violation of article 24, paragraph 1, in relation to the four minor children due to a failure to provide them with the necessary measures of protection as minors.

11. In accordance with article 2, paragraph 3 (a), of the Covenant, the State party is under an obligation to provide the author with an effective and appropriate remedy, including refraining from removing Mr. Madafferi from Australia before he has had the opportunity to have his spouse visa examined with due consideration given to the protection required by the children's status as minors. The State party is under an obligation to avoid similar violations in the future.

12. Bearing in mind that, by becoming a State party to the Optional Protocol, the State party has recognized the competence of the Committee to determine whether there has been a violation of the Covenant or not and that, pursuant to article 2, of the Covenant, the State party has undertaken to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the Covenant, the Committee wishes to receive from the State party, within 90 days, information about the measures taken to give effect to its Views. The State party is also requested to publish the Committee's Views.

[Adopted in English, French and Spanish, the English text being the original version. Subsequently to be issued also in Arabic, Chinese and Russian as part of the present report.]

Notes

[1] The authors had provided a psychological report, dated 4 July 2001, in which the psychiatrist expressed his "serious concern about [Mr. Madafferi's] psychological state under conditions of continued detention. One might expect … the dysfunctional symptoms of his stress disorder to be exacerbated by further detention … there will be serious issues not only about his being able to adequately instruct his legal advisers but also whether or not he will be so damaged psychologically that he will be unable to return to his previous capacity …".

[2] According to this decision, although the Deputy President initially remarked that Mr. Madafferi is not of good character he went on to say that, "There is no reliable evidence that he has committed any crime since the mid-1980's. He was only 23 years old at the time of

the second attempted extortion and 24 years old at the time of the fight in prison. He is now 39 years old … I think it would be inappropriate to judge him by the crimes that he committed long ago in another country." The Tribunal also pointed out that some of the convictions in Italy were conducted in absentia and possibly subject to appeal and reversal should he choose to pursue such remedies. In addition, it added that such convictions conducted in absentia are intolerable under Australian law and accordingly should not be given weight under Australian jurisprudence. Appropriate attention was also paid to Mr. Madafferi's children who "… must be regarded as a primary consideration." The weight attached to the interests of the children, is in accordance with the High Court's decision in *Minister for Immigration and Ethnic Affairs v. Teoh* (1995) 183 CLR 273. The presiding judge concluded that, "... the factors weighting in favour of the granting of a visa, particularly the interests of the children, should predominate over the factors weighting in favour of refusing one".

[3] On 22 June 2002 the Italian authorities notified Mr. Madafferi that they had extinguished his outstanding sentence and cancelled the outstanding warrant for his arrest.

[4] (1992) 176 CLR 1.

[5] Section 501A (2) of the Migration Act provides that where the Minister: reasonably suspects that a person does not pass the "character test"; and the person does not satisfy the Minister that the person passes the "character test", then the Minister can: set aside a decision of a delegate or the AAT not to refuse to grant a visa to the person or to refuse to cancel a visa already issued to the person; and refuse to grant a visa to the person or cancel a visa that has been granted to the person, but only where the Minister is satisfied that the refusal or cancellation is in the national interest. Subsection 501 (6) provides that a person does not pass the character test if: "(a) the person has a substantial criminal record (as defined by subsection (7)); or (b) the person has or has had an association with someone else, or with a group or organization, whom the Minister reasonably suspects has been or is involved in criminal conduct; or (c) having regard to either or both of the following: (i) the person's past and present criminal conduct; (ii) the person's past and present general conduct; the person is not of good character; or (d) in the event the person were allowed to enter or to remain in Australia, there is a significant risk that the person would: (i) engage in criminal conduct in Australia; or (ii) harass, molest, intimidate or stalk another person in Australia; or (iii) vilify a segment of the Australian community; or (iv) incite discord in the Australian community or in a segment of that community; or (v) represent a danger to the Australian community or to a segment of that community, whether by way of being liable to become involved in activities that are disruptive to, or in violence threatening harm to, that community or segment, or in any other way. Otherwise, the person passes the character test."

"Substantial criminal record" is defined for the purposes of the character test in subsection 501 (7) to mean where: "(a) the person has been sentenced to death; or (b) the person has been sentenced to imprisonment for life; or (c) the person has been sentenced to a term of imprisonment of 12 months or more; or (d) the person has been sentenced to two or more terms of imprisonment (whether on one or more occasions), where the total of those terms is two years or more; or (e) the person has been acquitted of an offence on the grounds of unsoundness of mind or insanity, and as a result the person has been detained in a facility or institution".

[6] The State party explains that in addition to legislative provisions, a number of directions were made under section 499 of the Migration Act to ensure that the powers under that Act are exercised in a proper and consistent manner. The Minister tables such directions in Parliament. These directions do not limit the discretion of a decision maker or authorize improper decision-making. At the time of the decision to deny Mr. Madafferi a visa, Direction 17 dealt with visa refusal and cancellation under section 501. It provided directions on, inter alia, the application of the character test in the Act.

[7] Case No. 112/1993.

[8] Case No. 112/81.

[9] In relation to the nature of the rights in question the State party refers to the following cases of the ECHR to demonstrate that deportation proceedings are not "suits at law". *Agee v. United Kingdom*, 7729/76, DR 7, 164, which related to the right to reside in a country and the removal of an alien; *X. v. United Kingdom*, 7902/77, DR 9, 224, which concerned the termination of a residence permit granted to an alien and a decision to deport the alien; *Appal et al. v. United Kingdom*, 8244/78 DR 17, 149, which concerned a request for a residence permit.

[10] In this regard it refers to *Winata v. Australia*, case No. 930/2000, in which the Committee decided that "the mere fact that one member of a family is entitled to remain in the territory of a State party does not necessarily mean that requiring other members of the family to leave involves … interference". It also refers to several cases of the ECHR to support its argument that there is no legitimate expectation of continuing life in a State territory where a member of a family has been residing in a country unlawfully.

[11] It refers to the ECHR case of *Moustaquim v. Belgium* (1991) 13 EHRR 802, at p. 814.

[12] According to the authors, the Migration Agent, John Young, submitted a number of medical reports to DIMIA, including one by a Dr. Arduca, in which he stated that "In my opinion, this state of severe mental conflict puts Mr. Madafferi at significant risk of self-harm. Removing him from his home and family and placing him in detention would profoundly compound this risk."

[13] Mr. Madafferi remained an involuntary patient for approximately six months. Since then he has been residing with his family and receiving psychiatric treatment. Apparently, he is still unfit to travel.

[14] They state that Direction 17 has been the subject matter of judicial review and has subsequently been replaced by Direction 21.

[15] No further argumentation is provided by the authors.

[16] *C. v. Australia*, case No. 900/1999.

[17] *Winata v. Australia*, case No. 930/2000.

APPENDIX

Individual opinion of Committee member Mr. Nisuke Ando

I am not opposed to the adoption of the Committee's Views in this case. However, because of the irregularities I perceive in the procedure leading to its adoption, I do not participate in the consensus by which the Committee adopted the Views.

(*Signed*): Nisuke Ando

[Adopted in English, French and Spanish, the English text being the original version. Subsequently to be issued also in Arabic, Chinese and Russian as part of the present report.]

Individual opinion of Committee member Ms. Ruth Wedgwood

In Australia, visa applications are judged against a statutory standard of "public interest". In this assessment, "the person's past criminal conduct" and "the person's general conduct" may be considered as evidence of a lack of "good character". Any visa denial by a lower-level official can be reviewed by an administrative appeals tribunal of the Department of Immigration and Multicultural Affairs.

Ultimately, however, the administrative appeals process is not dispositive. The Minister of Immigration retains independent statutory authority to set aside a favourable decision of a lower-level official or the tribunal. The Minister may do so when he "reasonably suspects that the person does not pass the character test", he is not satisfied to the contrary by the applicant, and he finds that the refusal of a visa is "in the national interest". This set-aside is not so subjective as it sounds, for a "substantial criminal record" is a statutory basis for finding a lack of good character, and any "term of imprisonment of 12 months or more" constitutes a "substantial criminal record".

The co-author of this communication, Mr. Francesco Madafferi, was subject to such visa disapproval by the Australian Minister of Immigration, based on his extensive criminal record. The Australian administrative appeals tribunal was inclined to accord him more leniency than did the Minister, but the appeals tribunal also reported a criminal record that goes well beyond what is noted by the Committee in its Views, *see footnote 2 supra.*[1]

Invoking article 17 of the Covenant on Civil and Political Rights, the Committee now seeks to preclude the Minister's decision to deport Francesco Madafferi. Article 17 forbids "arbitrary or unlawful interference" with family life. But the State party's ultimate decision in regard to Mr. Madafferi is neither arbitrary or unlawful. The human sympathy that may be felt for a visa applicant and his family does not create a license to disregard reasonable criteria for the grant or denial of visas. States are entitled to exclude persons who have a serious history of criminal conduct. Mr. Madafferi's prior convictions and jail sentences amply fulfil the statutory requirement for a "substantial criminal record" as a basis for the Australian Minister's decision.

The Committee has no evident warrant to assign its own chosen weight to the relative importance of protecting against recidivist criminal conduct versus minimizing family burdens. There are millions of immigration decisions each year, and we are not entitled to "reverse" State governments simply because we might weigh the balance differently. Nor does the record show any permanent hardship in Mr. Madafferi's return to Italy. Italy was his home country until the age of 18. His family is entitled to reside in Italy with him. He has three sisters in Italy, according to the findings of the Australian administrative tribunal, and his relatively young children understand the Italian language, as used in the family home, although they speak English. Mr. Madafferi has the capacity to run a small business, as he did in Australia. Upon his return to Italy, Mr. Madafferi does not face incarceration or detention. Obviously, the State party could not deport him unless he is medically fit to travel at the time.

Australia follows the principle of *jus solis*, awarding citizenship to every child born on its territory. But the birth of a child does not, by itself, shield a parent from the consequences of his illegal entry, and a rule to the contrary would provide a significant challenge to the enforcement of immigration laws. Here there is no inevitable separation between members of a family, nor any demonstrated difficulty in sustaining Australian citizenship for the children. As noted by the several dissenters in *Winata v. Australia*, No. 930/2000, article 17 of the Covenant is not identical to the European Convention on Human Rights, and the test of "substantial changes to long-settled family life" may not be suitable to a universal covenant that speaks of "arbitrary or unlawful interference" with family life.

(*Signed*): Ruth Wedgwood

[Adopted in English, French and Spanish, the English text being the original version. Subsequently to be issued also in Arabic, Chinese and Russian as part of the present report.]

Note

[1] In 1980, according to the appeals tribunal, Mr. Madafferi took part as a "bag man" in a violent extortion scheme - unknown persons exploded a bomb in the home of three brothers and demanded payment, Mr. Madafferi went on their behalf to pick up the extortion payment of 3 million lire at a pre-arranged spot, and was promised 500,000 lire for his trouble. He received a suspended sentence of 22 months' imprisonment. In another incident in 1980, he was found to have inflicted multiple stab wounds to the back and abdomen of a victim in Seregno, Italy, and was sentenced to 30 months' imprisonment, though his sentence was later quashed as part of an amnesty. In 1982, he stabbed a man during a fight with the man's older brother, and was convicted of causing malicious personal injuries with aggravating circumstances, with a sentence of eight months. In the same incident, he was found to have in his possession 321 milligrams of heroin, 45 milligrams of monoacetylmorphene, and 107 milligrams of cocaine, and he was sentenced to 40 months in jail, with a 5 million lire fine. In 1984, while the latter charges were pending, he again took part in an extortion scheme, demanding money and making threats by telephone against another victim. He was sentenced to 30 months' imprisonment and a fine of 1.5 million lire. The sentence was later reduced to two years' imprisonment and 1 million lire. All of these convictions were entered in Italy, in the presence of the defendant. In addition, he had two convictions for receipt of stolen property and assault of a fellow prisoner which were reached in absentia, which have since been set aside by Italian authorities.

Z. Communication No. 1015/2001, *Ferterer v. Austria* (Views adopted on 20 July 2004, eighty-first session)*

Submitted by: Paul Perterer (represented by counsel, Mr. Alexander H.E. Morawa)

Alleged victim: The author

State party: Austria

Date of communication: 31 July 2001 (initial submission)

The Human Rights Committee, established under article 28 of the International Covenant on Civil and Political Rights,

Meeting on 20 July 2004,

Having concluded its consideration of communication No. 1015/2001, submitted to the Human Rights Committee on behalf of Paul Perterer under the Optional Protocol to the International Covenant on Civil and Political Rights,

Having taken into account all written information made available to it by the author of the communication, and the State party,

Adopts the following:

Views under article 5, paragraph 4, of the Optional Protocol

1. The author of the communication is Mr. Paul Perterer, an Austrian citizen. He claims to be a victim of violations by Austria[1] of articles 14, paragraph 1, and 26 of the Covenant. He is represented by counsel.

The facts as submitted by the author

2.1 In 1980, the author was employed by the municipality of Saalfelden in the province of Salzburg. In 1981, he was appointed head of the administrative office of the municipality. On 31 January 1996, the mayor of Saalfelden filed a disciplinary complaint against the author with the Disciplinary Commission for Employees of Municipalities of the Province of Salzburg alleging, inter alia, that the author had failed to attend hearings on building projects, that he had used office resources for private purposes, that he had been absent during office hours, and other professional shortcomings. Moreover, the mayor claimed that the author had lost his reputation and the confidence of the public because of his private conduct.

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* The following members of the Committee participated in the examination of the present communication: Mr. Abdelfattah Amor, Mr. Nisuke Ando, Mr. Prafullachandra Natwarlal Bhagwati, Ms. Christine Chanet, Mr. Franco Depasquale, Mr. Maurice Glèlè Ahanhanzo, Mr. Walter Kälin, Mr. Ahmed Tawfik Khalil, Mr. Rajsoomer Lallah, Mr. Rafael Rivas Posada, Sir Nigel Rodley, Mr. Martin Scheinin, Mr. Ivan Shearer, Mr. Hipólito Solari Yrigoyen, Ms. Ruth Wedgwood, Mr. Roman Wieruszewski and Mr. Maxwell Yalden.

2.2 On 29 February 1996, the trial senate of the Disciplinary Commission initiated proceedings against the author, and on 28 May 1996, suspended him from office, reducing his salary by one third. On 4 June 1996, the author challenged the chairman of the senate, Mr. Guntram Maier, pursuant to section 124, paragraph 3,[2] of the Federal Civil Servants Service Act. During a hearing held in June 1996, the chairman himself dismissed the challenge, arguing that the Salzburg Civil Servants of Municipalities Act,[3] as well as the Federal Civil Servants Act (Federal Act), permitted a challenge only with respect to members, but not the chairperson of the senate.

2.3 After the author had submitted a medical report by a neurologist to the Disciplinary Commission, stating that he was unfit to stand trial, this report was forwarded, allegedly by the chairman of the trial senate, to the Regional Administrative Authority in Zell am See which, on 7 August 1996, summoned the author to undergo a medical examination to assess his aptness to drive a vehicle. The author subsequently brought criminal charges against the chairman, Mr. Maier, for breach of confidentiality in public office. This complaint was later dismissed.

2.4 On 4 July 1996, the trial senate of the Disciplinary Commission dismissed the author. By decision of 25 September 1996, the Disciplinary Appeals Commission for Employees of Municipalities (*Disziplinaroberkommission für Gemeindebedienstete*), on the author's appeal, referred the case back to the Disciplinary Commission, on the basis that the participation of the chairman constituted a violation of the author's right to a fair trial, since the right to challenge a member of the senate also extended to its chairperson.

2.5 On 26 March 1997, the trial senate of the Disciplinary Commission, presided by Mr. Michael Cecon, initiated a second set of proceedings against the author. During a hearing in April 1997, the author challenged the composition of the trial senate, arguing that the two members nominated by the municipality of Saalfelden lacked independence and impartiality due to their status as municipal officials or employees. The senate dismissed the challenges and, on 1 August 1997, again dismissed the author from service. In an undated decision, the Appeals Commission upheld the dismissal. On 2 December 1997, the municipality of Saalfelden terminated the payment of the author's reduced salary as well as his coverage under the public health insurance scheme.

2.6 On 7 January 1998, the author complained against the decision of the Appeals Commission to the Austrian Constitutional Court, alleging breaches of his right to a fair trial before a tribunal established by law. On 11 March 1998, the Court refused leave to appeal and referred the case to the Administrative Court which, on 10 February 1999, set aside the decision of the Appeals Commission, holding that the author had been unlawfully deprived of his right to challenge members of the trial senate of the Disciplinary Commission.

2.7 After the Appeals Commission had referred the matter back to the Disciplinary Commission, the trial senate, by procedural decision of 13 July 1999, initiated a third set of proceedings, again suspending the author from office. The author subsequently challenged the senate chairman, Michael Cecon, and two other members appointed by the Provincial

Government for lack of impartiality, since they had participated in the second set of proceedings and had voted for his dismissal. By procedural decision of 3 August 1999, the chairman of the senate was replaced by the substitute chairman, Guntram Maier, who had chaired the trial senate in the first set of proceedings, and who had refused to desist when challenged by the author, and against whom the author had brought criminal charges. The author then reiterated his challenge, specifically challenging Mr. Maier, as being prima facie biased because of his previous role. On 16 August 1999, the chairman informed the author that Mr. Cecon would resume chairmanship.

2.8 The author subsequently filed complaints against the procedural decisions of 13 July and 3 August 1999 with the Constitutional Court, alleging breaches of his right to a trial before a tribunal established by law because of the composition of the trial senate, at the same time requesting the Court to review the constitutionality of the Salzburg Civil Servants of Municipalities Act (Salzburg Act), insofar as it provided for the participation of members delegated by the interested municipality. On 28 September 1999, the complaints were rejected by the Constitutional Court and, on 21 June 2000, by the Administrative Court, after the matter had been referred to it.

2.9 Meanwhile, on 23 September 1999, the Disciplinary Commission had dismissed the author from service, after it had rejected a formal request to summon defence witnesses and to admit further evidence. On 11 October 1999, the author lodged an appeal against his dismissal with the Appeals Commission, which confirmed the trial senate's decision on 6 March 2000, without a hearing and after the author had challenged its chairman (who was later replaced) and the two members appointed by the Provincial Government due to their participation in previous decisions in his case. On 14 March 2000, the municipality of Saalfelden once again terminated the payment of the author's reduced salary, as well as his public health insurance coverage.

2.10 On 25 April 2000, the author filed a complaint against the decision of 6 March 2000 of the Appeals Commission with the Administrative Court, challenging the composition of the trial and appeal senates, the trial senate's refusal to hear defence witnesses and to admit further evidence, and other procedural irregularities. On 29 November 2000, the Court dismissed the author's complaint as unfounded. By reference to a previous decision concerning a different case, the Court rejected the author's objection to Mr. Cecon's repeated chairmanship during the third set of proceedings.

The complaint

3.1 The author alleges violations of his rights under article 14, paragraph 1, read in conjunction with article 25, and under article 26 of the Covenant, as his trial was neither "fair" nor "public" nor concluded expeditiously, but was unduly delayed and conducted by bodies biased against him. He argues that proceedings concerning employment matters are "suits at law" within the meaning of article 14, paragraph 1, irrespective of the status of one of the parties.[4]

3.2 The author concedes that States parties may establish specialized tribunals to deal with, inter alia, employment disputes for civil servants, as long as such establishment is based on reasonable and objective criteria and to the extent that such tribunals are independent and impartial. But as, pursuant to section 12, paragraph 5, of the Salzburg Act, two members of the senates had been delegated by the interested municipality and merely served for one specific trial, the principle that a tribunal must be independent from the executive and legislative branches, as well as from the parties to the proceedings, was violated. The author also argues that the duration of office terms is a relevant factor when assessing the independence of tribunal members.[5]

3.3 The author contends that his right to a public hearing under article 14, paragraph 1, was violated, because the hearings before the trial senates of the Disciplinary Commission were held in camera, pursuant to article 124, paragraph 3, of the Federal Act, and since neither the Appeals Commission nor the Constitutional or Administrative Courts held any hearings in his case. No "exceptional circumstances"[6] justified the exclusion of the public.

3.4 The author submits that, contrary to the principle that judges must not harbour preconceptions about the matter before them, several members of the trial senate during the third set of proceedings were of necessity partial, considering that they either continued to work as municipal employees of Saalfelden, or that they had previously been challenged by the author. In particular, the fact that Mr. Cecon resumed chairmanship after having been challenged by the author and replaced by Mr. Maier, whom the author, in turn, challenged because of his role during the first set of proceedings, established "understandable, verifiable and legitimate" cause to suspect that both available chairmen were biased against the author because of the challenges.

3.5 According to the author, the trial senate promoted the interests of the other party by furnishing witnesses for the prosecution with copies of their testimonies given during the first and second proceedings, by allowing them to quote from their previous statements, and by rejecting the author's requests to call witnesses as well as to admit further evidence. The trial senate allegedly manipulated the transcript of the 1999 hearing so as to make it appear as if the prosecutorial witnesses had actually given original testimony.

3.6 The manipulated transcript was allegedly only transmitted to his counsel two and a half weeks after the deadline for appealing the Disciplinary Committee's decision of 23 September 1999 to dismiss him, thereby depriving him of an opportunity to discover the procedural irregularities and to bring them to the attention of the Appeals Commission. These irregularities, as well as the trial senate's decision exclusively to hear prosecutorial witnesses, also violated his right to equality of arms, guaranteed by article 14, paragraph 1, of the Covenant.

3.7 The author submits that the length of the proceedings, which caused him expenses of 1.2 million ATS in legal fees and lasted for almost 5 years, starting with the filing of the disciplinary complaint against him by the mayor of Saalfelden on 31 January 1996, and ending on 8 January 2001 when he received the final decision of the Administrative Court, amounts to an unreasonable delay, in violation of his right to a fair hearing under article 14, paragraph 1. He argues that the subject matter of the proceedings, while being of particular importance to him, was not complex, which was underlined by the fact that the decision of the trial senate of 23 September 1999 was taken after only one hour of deliberations and amounted to only five pages. The following delays totalling three years were attributable to the State party, given that the first two sets of proceedings were null and void, as they had been conducted by trial senates composed in obvious breach of domestic procedural law: (a) from 4 June 1996, when the chairman of the trial senate in the first set of proceedings refused to relinquish chairmanship, until 26 March 1997, when a new trial senate was constituted; and (b) from 8 April 1997, when the author challenged members of the trial senate in the second set of proceedings, until 13 June 1999, when the trial senate was constituted in the third set of proceedings.

3.8 The author submits that he has exhausted domestic remedies and that the same matter is not being examined under another procedure of international investigation or settlement.

The State party's observations on admissibility

4.1 By note verbale of 26 November 2001, the State party challenged the admissibility of the communication, arguing that it is incompatible with article 14, paragraph 1, of the Covenant, and that the author has failed to exhaust domestic remedies.

4.2 The State party submits that the author has failed to raise his claims related to the lack of publicity of the proceedings, as well as the alleged irregularities regarding the transcript of the 1999 hearing, before the domestic tribunals. While his failure to assert the latter claim before the Appeals Commission might be justified by "a potentially delayed service" of the transcript, this was not the case with respect to his later complaints to the Constitutional and Administrative Courts. Similarly, the author had raised the issues that two members of the trial senate in the third set of proceedings had been nominated by the municipality of Saalfelden and that the witnesses for the prosecution had been provided with copies of their previous testimonies only in his appeal to the Appeals Commission, without asserting this claim in his subsequent complaint to the Administrative Court.

4.3 The State party contends that the only procedural flaws which the author raised in his appeal to the Administrative Court of 25 April 2000 related to the rejection of his requests to hear defence witnesses and to admit further evidence, the alleged bias of the members of the Disciplinary Commission, the failure of the Appeals Commission to hold an oral hearing, and to the length of proceedings. With respect to the latter, the author had failed to exhaust domestic remedies in relation to his claim that the proceedings had been unreasonably delayed, as he had only challenged this delay retroactively, without availing himself of the possibilities to file a request for transfer of competence (*Devolutionsantrag*), enabling individuals to bring a case before the competent higher authority if no decision is taken within six months, or to file a complaint about the administration's failure to take a decision within due time (*Säumnisbeschwerde*), with the Administrative Court, in order to reduce the length of the proceedings.

4.4 The State party asserts that the author should have claimed a violation of his right to a fair trial by invoking the constitutionally guaranteed ban of arbitrariness before the Constitutional Court, instead of appealing the decision of 6 March 2000 of the Appeals Commission before the Administrative Court, whose competence was limited to reviewing the lawfulness of administrative decisions under ordinary law. It concludes that the communication is inadmissible under article 5, paragraph 2 (b), of the Optional Protocol.

4.5 Lastly, the State party argues that the communication is inadmissible *ratione materiae* under article 3 of the Optional Protocol, since article 14, paragraph 1, of the Covenant does not apply to disputes between administrative authorities and civil servants exercising powers intrinsic to the nature of the public service, concerning their admission, career or termination of employment under public law.[7]

Author's comments on the State party's observations on admissibility

5.1 By letter of 27 January 2001, the author argues that the State party itself concedes that he raised the partiality of the trial senate in the third set of proceedings, its rejection of his requests to hear defence witnesses and to admit further evidence, the Appeals Commission's failure to hold an oral hearing and the unreasonable delay of the proceedings before the Administrative Court, and thus admitted that he had exhausted domestic remedies with regard to these claims.

5.2 The author challenges the State party's objection that he had failed to claim a violation of his right to a fair trial before the Constitutional Court by invoking the constitutionally guaranteed arbitrariness ban, stating that he had brought the complaint against his dismissal in the third set of proceedings directly to the Administrative Court only because the Constitutional Court had previously refused to deal with his substantially similar complaints relating to his dismissal in the second set of proceedings and to the procedural decisions of 13 July and 3 August 1999, referring them to the Administrative Court. In these complaints, he had alleged breaches of his right to a fair trial, in particular to a trial before a tribunal established by law, and, in one case, had requested the Constitutional Court to review the constitutionality of the Salzburg Act, insofar as it provided for the participation of members delegated by the municipality. By reference to the Committee's jurisprudence, the author argues that he is not required to submit a complaint to the domestic authorities over and over again, if the same matter has been rejected earlier.[8]

5.3 The author contests the State party's argument that he failed to challenge the manipulation of the transcript of the third trial hearing domestically, arguing that the transcript was withheld from his counsel so that the manipulations of the witnesses' testimonies were only discovered on review of the case file by counsel for the present communication. The failure to transmit the transcript to him in due time was attributable to the State party, which therefore should be precluded from asserting non-exhaustion of domestic remedies in that regard. The author concludes that the State party had the opportunity to remedy the alleged violations, since all complaints submitted to the Committee were in substance raised before the Austrian Constitutional and Administrative Courts.

5.4 As to the State party's *ratione materiae* objection, the author submits that, according to the Committee's jurisprudence,[9] article 14, paragraph 1, applies to proceedings relating to the dismissal of civil servants. This followed from the principle that human rights treaties must be interpreted in the manner most favourable to the individual,[10] as well as from a "contextual" analysis in the light of article 25 of the Covenant, which had no equivalent in the European Convention on the Protection of Human Rights and Fundamental Freedoms (ECHR) and indicated that the scope of article 14, paragraph 1, was wider than that of article 6, paragraph 1, ECHR. Moreover, he suggests that the Committee should not follow the restrictive and artificial approach taken by the European Court in *Pellegrin v. France*, which excluded civil servants who "wield a portion of the State's sovereign power" from the protection of article 6, paragraph 1, ECHR.[11]

5.5 Lastly, the author submits that the State party's argument that he could have accelerated the proceedings by requesting a transfer of competence (*Devolutionsantrag*) or by lodging a complaint about undue delay of proceedings (*Säumnisbeschwerde*) related to the merits rather than the admissibility of his complaint that the proceedings had been unreasonably delayed.

On the merits, he argues that none of the individual stages of the three sets of proceedings exceeded the duration of six months necessary for the above remedies. Moreover, while States parties were required to ensure expeditious proceedings, no corresponding obligation existed for individuals charged with disciplinary charges. On the contrary, individuals had a right to resort to whatever remedies to defend themselves against such charges, even if these remedies contributed to a delay.

The State party's additional submissions on admissibility and observations on merits

6.1 By note verbale of 27 March 2002, the State party further elaborated on its objections to admissibility and submitted its observations on the merits of the communication. On admissibility, it reiterates that the author failed to exhaust domestic remedies, adding that the dismissal of his earlier complaints by the Constitutional Court did not absolve him from specifically challenging the alleged deficiencies of the third set of proceedings. It maintains that the author's request for constitutional review of section 12, paragraph 5, of the Salzburg Act was based on an alleged lack of clarity of that provision rather than the alleged lack of independence of the members of the Disciplinary Commission delegated by the municipality of Saalfelden.

6.2 While conceding that the transcript of the 1999 trial was served on the author only two weeks after the deadline for appealing to the Appeals Commission had expired, the State party submits that, under the applicable law, the author could have raised any deficiencies in the transcript throughout the appeal proceedings and in his subsequent appeal to the Administrative Court.

6.3 The State party maintains that, similar to article 6, paragraph 1, ECHR, article 14, paragraph 1, of the Covenant does not apply to disputes between the administrative authorities and civil servants directly participating in the exercise of public powers,[12] such as the author, as reflected in the convergence of both provisions and, in particular, in the identical wording of their pertinent parts in the French authentic versions. The only exception recognized by the European Court of Human Rights concerned cases in which the claims relate to an essentially economic right. That the author's dismissal may ultimately have had a financial impact did not as such turn his case into a matter of civil rights and obligations.[13] Nor did the disciplinary proceedings constitute a determination of a criminal charge against the author, in the absence of a penalty equivalent to a criminal sanction.

6.4 Subsidiarily, the State party submits that, even if article 14, paragraph 1, was applicable, the Committee would be limited to a review of whether the alleged irregularities in the disciplinary proceedings amounted to a denial of justice or were otherwise arbitrary. This was not the case because domestic authorities had carefully examined compliance with the procedural rules and only confirmed the author's dismissal after having conducted three sets of proceedings. Similarly, the assessment of the relevance and value of requested evidence was a matter to be determined by the national courts, subject only to an abuse control. The author's evidentiary requests were dismissed on legitimate grounds, as they related to issues on which he had already provided documentary evidence.

6.5 The State party argues that the author failed to substantiate his claim concerning the alleged bias of members of the trial senate, which could not automatically be inferred from their participation in the previous proceedings. The participation of members who had been challenged without reasons did not as such call into question the impartiality of the tribunal, since the right to challenge senate members without stating reasons had to be distinguished from challenging a senate member for bias.

6.6 The State party submits that the author's right to appear before an independent and impartial tribunal was safeguarded by the freedom from instruction of the Disciplinary Commission's members (section 12, paragraph 6, of the Salzburg Act). Moreover, decisions of the Disciplinary Commission are subject to appeal to the Appeals Commission as well as the Administrative Court, which are both independent tribunals competent to examine questions of fact and law and, in the case of the Appeals Commission, composed of members not delegated by the interested municipalities and appointed for three-year terms. Without prejudice to the fact that the State party considers the Disciplinary Committee a tribunal within the meaning of article 14, paragraph 1, it argues that the author's right to be heard by an independent and impartial tribunal would therefore be secured even if the Disciplinary Commission were denied the quality of an independent and impartial tribunal, since article 14, paragraph 1, does not require States parties to have a decision on civil rights issued by a tribunal at all stages of appeal.

6.7 The State party contends that the 1997 trial transcript was sent to the witnesses in order to provide all persons involved in the 1999 proceedings "with the same state of information regarding their previous statements and procedural steps". The convergence between the 1997 and 1999 trial records merely reflected that the witnesses had made corresponding statements in the two oral hearings. Under section 44 of the Austrian Administrative Procedure Act, transcripts of hearings need not quote witnesses' testimonies entirely; summarizing the relevant content of such testimony did not amount to a manipulation.

6.8 As to the alleged lack of publicity of the proceedings, the State party submits that the exclusion of the general public was justified in the interest of official secrecy, which is frequently an issue in disciplinary proceedings. In order to protect an accused civil servant against secret administration of justice, section 124, paragraph 3, of the Federal Act allowed for the presence of up to three civil servants nominated by the accused as persons of confidence during the oral hearings.

6.9 The State party refutes the author's claim based on the lack of an oral hearing during the appeal proceedings, arguing that no such hearing is required if the case can be determined on the basis of the files, in connection with the statement of appeal. Since the author's appeal was confined to procedural complaints, without raising any new facts, the appellate bodies justifiably decided not to conduct a new oral hearing.

6.10 The State party submits that the author himself admitted that the statutory deadline for adopting a decision was met for any of the stages of the different sets of proceedings to which he was a party; the author went through the various stages of appeal on his own initiative, without any delay caused by the authorities and courts. For the State party, the author has failed to substantiate a violation of his rights under article 14, paragraph 1, read in conjunction with article 26 of the Covenant.

Additional comments by the author

7.1 By further submission of 14 June 2002, the author reiterates that he was not required to submit the same complaint to the Constitutional Court over and over again, given that the Court had clearly stated in its decisions of 11 March 1998 and 28 September 1999 that the author's case involved neither violations of his constitutional rights nor the application of an unconstitutional law, despite the fact that the Salzburg Act provided for the participation of two senate members delegated by the respondent party.

7.2 The author argues that, if a State decided to split the competencies of reviewing the fairness of proceedings under constitutional and ordinary law, between the two highest courts, applicants could only be required to submit a complaint to one of them. The State party was given sufficient opportunity to comply with its obligation to remedy the alleged violations, since the Administrative Court was competent to provide such a remedy upon examination of his complaint, even if "on a different formal level" than the Constitutional Court.

7.3 The author reiterates that, according to the Committee's jurisprudence,[14] article 14, paragraph 1, encompasses all proceedings of a civil or criminal character, whether or not civil or public servants are parties. By contrast to article 6, paragraph 1, ECHR, article 14, paragraph 1, of the Covenant makes no distinction between categories of civil servants, and is generally applicable to employment-related disputes. This follows from the clear wording ("suits at law") of article 14, paragraph 1, which the State party tried to ignore by reference to the European Court's contradictory case law that had no bearing on the Covenant system.

7.4 The author submits that the State party implicitly concedes that the participation of two senate members delegated by the municipality of Saalfelden in the disciplinary proceedings constituted a breach of article 14, paragraph 1. The lack of independence and impartiality of the Disciplinary Commission was not cured by the review of his dismissal on facts and law at the appeal level, since neither the Appeals Commission nor the Administrative Court conducted an inquiry into the facts on their own, being bound by the findings of fact of the first instance trial senate. In the absence of an adversarial oral hearing at the appellate stage, the author was deprived of his right to a fair and public hearing by an independent and impartial tribunal and, more specifically, of an opportunity to impeach the testimony of the prosecutorial witnesses. Moreover, the appeals senate was as partial and dependent as the trial senate.

7.5 For the author, the decision of whether or not to call witnesses cannot be left to the unlimited discretion of the national tribunals, arguing that the State party failed to refute his allegation that the trial senate had denied him equality of arms in presenting his defence. Similarly, the State party's explanations concerning the falsification of the 1999 trial transcript were illogical.

7.6 As to the length of proceedings, the author reiterates that the fact that he had been compelled to proceed to the first or second appeals levels to have clearly illegal acts of the trial senate set aside could not be attributed to him.

7.7 The author challenges that the exclusion of the general public from the trial senate hearings was justified in the interest of official secrecy, since none of the charges against him involved matters of a secret nature. Most of the counts concerned allegations of improper behaviour, while the other charges related to public rather than secret matters. In any event, the Disciplinary Commission could have dealt in camera with any issue requiring secrecy and could have used acronyms to ensure the privacy of third persons. The assistance of up to three civil servants in disciplinary proceedings failed to meet the standard of a "public hearing" within the meaning of article 14, paragraph 1, which also served the purpose of safeguarding the transparency of the administration of justice.

Additional observations by the State party and author's comments

8. Both parties made additional submissions on 14 and 27 January 2003, respectively. The State party argued that, by failing to request an oral hearing before the Administrative Court, the author had waived his right under article 14, paragraph 1, to a fair and public hearing, since he must have been aware, on the basis of his legal representation by counsel, that without an explicit request to that effect, proceedings before the Administrative Court were usually only conducted in writing. The author considers the State party's additional observations procedurally inadmissible, on the basis that they were submitted out of time (i.e. more than six months after submission of his comments of 14 June 2002), thereby unduly prolonging the proceedings.

Issues and proceedings before the Committee

Consideration of admissibility

9.1 Before considering any claim contained in a communication, the Human Rights Committee must, in accordance with rule 87 of its rules of procedure, decide whether or not the communication is admissible under the Optional Protocol to the Covenant.

9.2 With regard to the State party's objection *ratione materiae*, the Committee recalls that the concept of a "suit at law" under article 14, paragraph 1, is based on the nature of the right in question rather than on the status of one of the parties.[15] The imposition of disciplinary measures taken against civil servants does not of itself necessarily constitute a determination of one's rights and obligations in a suit at law, nor does it, except in cases of sanctions that, regardless of their qualification in domestic law, are penal in nature, amount to a determination of a criminal charge within the meaning of the second sentence of article 14, paragraph 1. In the present case, the State party has conceded that the trial senate of the Disciplinary Commission was a tribunal within the meaning of article 14, paragraph 1, of the Covenant. While the decision on a disciplinary dismissal does not need to be determined by a court or tribunal, the Committee considers that whenever, as in the present case, a judicial body is entrusted with the task of deciding on the imposition of disciplinary measures, it must respect the guarantee of equality of all persons before the courts and tribunals as enshrined in article 14, paragraph 1, and the principles of impartiality, fairness and equality of arms implicit in this guarantee. Consequently, the Committee declares the communication admissible *ratione materiae* insofar as the author claims to be a victim of violations of his rights under article 14, paragraph 1, of the Covenant.

9.3 As to the author's claim that the lack of an oral hearing during the appeal proceedings violated his right to a fair and public hearing under article 14, paragraph 1, the Committee has noted the State party's argument that the author could have requested an oral hearing before the Administrative Court and that, failing this, he had waived his right to such a hearing. The Committee also notes that the author has not refuted this argument in substance, and that, throughout the proceedings, he was represented by counsel. It therefore considers that the author has failed to substantiate, for purposes of admissibility, that his right to an oral hearing has been violated. The Committee concludes that this part of the communication is inadmissible under article 2 of the Optional Protocol.

9.4 The Committee has taken note of the State party's objection that the author did not exhaust domestic remedies in relation to his claims concerning the lack of independence of the two members of the trial senate delegated by the municipality of Saalfelden in the third set of proceedings, the lack of publicity of the hearings before that senate, the fact that copies of the 1997 testimonies had been sent to the prosecutorial witnesses prior to the 1999 trial hearing, and the alleged manipulation of the 1999 trial transcripts. After careful examination of the author's complaints to the Appeals Commission (complaint dated 11 October 1999) and to the Administrative Court (complaints dated 21 January and 25 April 2000), the Committee observes that the author has failed to raise these claims before the Appeals Commission or, in any event, before the Administrative Court.

9.5 Moreover, it does not appear from the file before the Committee that the author challenged the participation of the trial senate members, on the basis that they had been designated by the municipality, in his constitutional complaint challenging the trial senate's procedural decision of 13 July 1999. Consequently, the Committee concludes that the author has failed to exhaust domestic remedies with regard to these claims and that, consequently, this part of the communication is inadmissible under article 5, paragraph 2 (b), of the Optional Protocol.

9.6 With regard to the remainder of the communication, the Committee has taken note of the State party's argument that the author should have lodged a complaint with the Constitutional Court against the confirmation of his dismissal by the Appeals Commission in the third set of proceedings, in order to have this decision reviewed not only under ordinary, but also under constitutional law. In this regard, the Committee recalls its consistent jurisprudence that article 5, paragraph 2 (b), of the Optional Protocol does not require resort to domestic remedies which objectively have no prospect of success.[16] Although the author's constitutional complaint of 25 August 1999 concerned the second rather than the third set of proceedings, the allegations underlying this complaint were substantively similar to the claims raised in his complaint of 25 April 2000 to the Administrative Court. The Committee also observes that, by the time the author appealed the decision of the Appeals Commission of 6 March 2000, the proceedings had already extended over a period of more than four years.[17] Under these circumstances, the Committee is satisfied that the author, by filing a complaint against his dismissal in the third set of proceedings with the Administrative Court, has made reasonable efforts to exhaust domestic remedies.

9.7 The Committee considers that the author has sufficiently substantiated, for purposes of admissibility, his claim that the alleged bias of the members of the trial senate in the third set of proceedings, its rejection of the author's request to hear witnesses and to admit further evidence, its delay in sending him the 1999 trial transcript, and the length of the disciplinary proceedings raise issues under article 14, paragraph 1.

9.8 To the extent that the author alleges a violation of his rights under article 26 of the Covenant, the Committee finds that he has failed to substantiate, for purposes of admissibility, any claim of a potential violation of that article. The communication is therefore inadmissible under article 2 of the Optional Protocol, insofar as article 26 is concerned.

Consideration of the merits

10.1 The issue before the Committee is whether the proceedings of the trial senate of this Commission violated article 14, paragraph 1, of the Covenant.

10.2 With regard to the author's claim that several members of the trial senate in the third set of proceedings were biased against him, either because of their previous participation in the proceedings, the fact that they had already been challenged by the author, or because of their continued employment with the municipality of Saalfelden, the Committee recalls that "impartiality" within the meaning of article 14, paragraph 1, implies that judges must not harbour preconceptions about the matter put before them, and that a trial flawed by the participation of a judge who, under domestic statutes, should have been disqualified cannot normally be considered to be fair and impartial.[18] The Committee notes that the fact that Mr. Cecon resumed chairmanship of the trial senate after having been challenged by the author during the same set of proceedings, pursuant to section 124, paragraph 3, of the Federal Civil Servants Act, raises doubts about the impartial character of the third trial senate. These doubts are corroborated by the fact that Mr. Maier was appointed substitute chairman and temporarily even chaired the senate, despite the fact that the author had previously brought criminal charges against him.

10.3 The Committee observes that, if the domestic law of a State party provides for a right of a party to challenge, without stating reasons, members of the body competent to adjudicate disciplinary charges against him or her, this procedural guarantee may not be rendered meaningless by the reappointment of a chairperson who, during the same stage of proceedings, had already relinquished chairmanship, based on the exercise by the party concerned of its right to challenge senate members.

10.4 The Committee also notes that, in its decision of 6 March 2000, the Appeals Commission failed to address the question of whether the decision of the Disciplinary Commission of 23 September 1999 had been influenced by the above procedural flaw, and to that extent merely endorsed the findings of the Disciplinary Commission.[19] Moreover, while the Administrative Court examined this question, it only did so summarily.[20] In the light of the above, the Committee considers that the third trial senate of the Disciplinary Commission did not possess the impartial character required by article 14, paragraph 1, of the Covenant and that the appellate instances failed to correct this procedural irregularity. It concludes that the author's right under article 14, paragraph 1, to an impartial tribunal has been violated.

10.5 With respect to the rejection by the Disciplinary Commission of the author's requests to call witnesses and to admit further evidence in his defence, the Committee recalls that, in principle, it is beyond its competence to determine whether domestic tribunals properly evaluate the relevance of newly requested evidence.[21] In the Committee's view, the trial senate's decision that the author's evidentiary requests were futile because of the sufficient written evidence does not amount to a denial of justice, in violation of article 14, paragraph 1.

10.6 As to the trial senate's failure to transmit the 1999 trial transcript to the author before the end of the deadline for appealing the decision of the Disciplinary Commission of 23 September 1999, the Committee observes that the principle of equality of arms implies that the parties to the proceedings must have adequate time and facilities for the preparation of their arguments, which, in turn, requires access to the documents necessary to prepare such arguments.[22] However, the Committee observes that adequate preparation of one's defence cannot be equated with the adequate preparation of an appeal. Furthermore, it considers that the author has failed to demonstrate that the late transmittal of the 1999 trial transcript prevented him from raising the alleged irregularities before the Administrative Court, especially since he admits himself that the alleged manipulation of the testimonies was only discovered by counsel for the present communication. The Committee therefore concludes that the author's right to equality of arms under article 14, paragraph 1, has not been violated.

10.7 Regarding the length of the disciplinary proceedings, the Committee considers that the right to equality before the courts, as guaranteed by article 14, paragraph 1, entails a number of requirements, including the condition that the procedure before the national tribunals must be conducted expeditiously enough so as not to compromise the principles of fairness and equality of arms. The Committee observes that responsibility for the delay of 57 months to adjudicate a matter of minor complexity lies with the authorities of Austria. It also observes that non-fulfilment of this responsibility is neither excused by the absence of a request for the transfer of competence (*Devolutionsantrag*), nor by the author's failure to lodge a complaint about undue delay of proceedings (*Säumnisbeschwerde*), as it was primarily caused by the State party's failure to conduct the first two sets of proceedings in accordance with domestic procedural law. The Committee concludes that the author's right to equality before the courts and tribunals has been violated.

11. The Human Rights Committee, acting under article 5, paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights, is of the view that the facts before it reveal a violation of article 14, paragraph 1, of the Covenant.

12. In accordance with article 2, paragraph 3, of the Covenant, the State party is under an obligation to provide the author with an effective remedy, including payment of adequate compensation. The State party is also under an obligation to prevent similar violations in the future.

13. Bearing in mind that, by becoming a party to the Optional Protocol, the State party has recognized the competence of the Committee to determine whether there has been a violation of the Covenant or not and that, pursuant to article 2 of the Covenant, that State party has undertaken to ensure all individuals within its territory or subject to its jurisdiction the rights recognized in the Covenant and to provide an effective and enforceable remedy in case a violation has been established, the Committee wishes to receive from the State party, within 90 days, information about the measures taken to give effect to the Committee's Views. The State party is also requested to publish the Committee's Views.

[Adopted in English, French and Spanish, the English text being the original version. Subsequently to be issued also in Arabic, Chinese and Russian as part of the present report.]

Notes

[1] The Covenant and the Optional Protocol to the Covenant entered into force for the State party respectively on 10 December 1978 and 10 March 1988.

[2] Section 124, paragraph 3, of the Federal Civil Servants Act provides: "With the order instituting proceedings (Verhandlungsbeschluß), the accused shall be notified of the composition of the senate, including replacement members. The accused may challenge, without stating reasons, a member of the senate within one week after the order has been served. Upon request of the accused, up to three civil servants may be present during the hearing. The hearing shall otherwise be held in camera."

[3] Section 12 of the Salzburg Civil Servants of Municipalities Act reads, in pertinent parts: "(1) A Disciplinary Commission for Employees of Municipalities is established at the Office of the Provincial Government to conduct first instance disciplinary trials. (2) The Disciplinary Commission is composed of a chairperson, deputy chairpersons, and the necessary number of members. (3) The Provincial Government shall appoint for a period of three years the chairperson and the deputy chairpersons, who have to be chosen from among the civil servants with legal training employed by the Office of the Provincial Government or the Regional Administrative Authorities and the members - with the exception of those members delegated by the municipalities pursuant to paragraph 5 - who have to be chosen from among the civil servants employed by the municipalities governed by the present Act. (4) The Disciplinary Commission tries and decides cases in senates composed of a chairperson and four members. The chairperson and two members chosen from among the civil servants employed by municipalities are appointed by the Provincial Government. (5) Two further members of the senates are delegated by the municipality which is a party to the proceedings. If the municipality fails to delegate two members or replacement members [...] within a period of three days after a written request, the chairperson shall select civil servants of the Provincial Government as additional members. [...]"

[4] The author refers to communications No. 112/1981, *Y.L. v. Canada,* decision on admissibility adopted on 8 April 1986, and No. 203/1986, *Rubén Toribio Muñoz Hermoza v. Peru,* Views of 4 November 1988.

[5] The author refers to CCPR, twenty-first session (1984), general comment 13: *Equality before the courts and the right to a fair and public hearing by an independent court established by law (art. 14)*, at para. 3.

[6] Reference is made to ibid., at para. 6.

[7] The State party refers to the judgements of the European Court of Human Rights in applications No. 28541/95, *Pellegrin v. France*, 8 December 1999, at paras. 64 et seq., and No. 39564/98, *G.K. v. Austria*, 14 March 2000.

[8] The author refers to communications Nos. 210/1986 and 225/1987, *Earl Pratt and Ivan Morgan v. Jamaica*, Views adopted on 6 April 1989.

[9] Reference is made, inter alia, to communication No. 824/1998, *N.M. Nicolov v. Bulgaria*, decision on admissibility adopted on 24 March 2000, at para. 8.3; communication No. 468/1991, *Angel N. Oló Bahamonde v. Equatorial Guinea*, Views adopted on 20 October 1993; and communication No. 203/1986, *Rubén Toribio Muñoz Hermoza v. Peru*.

[10] The author refers, inter alia, to the Advisory Opinion of the Inter-American Court in *Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism (Arts. 13 and 29 American Convention on Human Rights)*, Advisory Opinion OC-5/85 of 13 November 1985, Series A, No. 5.

[11] See European Court of Human Rights, application No. 28541/95, *Pellegrin v. France*, judgement of 8 December 1999, at para. 65.

[12] Reference is made, inter alia, to the dissenting opinion of the Committee members *Graefrath*, *Pocar* and *Tomuschat* in communication No. 112/1981, *Y.L. v. Canada*, at para. 3.

[13] The State party refers to the judgements of the European Court of Human Rights in *Pierre-Bloch v. France*, judgement of 21 October 1997, at para. 51, and in *Pellegrin v. France*, judgement of 8 December 1999, at para. 60.

[14] The author cites communications No. 112/1981, *Y.L. v. Canada*, No. 203/1986, *Rubén Toribio Muñoz Hermoza v. Peru*, and No. 824/1998, *N. M. Nicolov v. Bulgaria*, as well as communication No. 454/1991, *Enrique Garcia Pons v. Spain*, Views adopted on 30 October 1995.

[15] See communication No. 112/1981, *Y.L. v. Canada*, at para. 9.2; communication No. 441/1990, *Robert Casanovas v. France*, Views adopted on 19 July 1994, at para. 5.2.

[16] See communications Nos. 210/1986 and 225/1987, *Earl Pratt and Ivan Morgan v. Jamaica*, at para. 12.3.

[17] Cf. communication No. 336/1988, *Andre Fillastre and Pierre Bizouarn v. Bolivia*, Views adopted on 5 November 1991, at para. 5.2.

[18] See communication No. 387/1989, *Arvo O. Karttunen v. Finland*, Views adopted on 23 October 1992, at para. 7.2.

[19] See page 3 of the decision of 6 March 2000 of the Appeals Commission, No. 11-12294/94-2000.

[20] See pages 7 et seq. of the decision of 29 November 2000 of the Administrative Court, No. Zl. 2000/09/0079-6.

[21] Cf. communication No. 174/1984, *J.K. v. Canada*, decision on admissibility adopted on 26 October 1984, at para. 7.2.

[22] See general comment 13, at para. 9.

AA. Communication No. 1033/2001, *Nallaratnam v. Sri Lanka* (Views adopted on 21 July 2004, eighty-first session)*

Submitted by:	Mr. Nallaratnam Singarasa (represented by counsel, Mr. V.S. Ganesalingam of Home for Human Rights as well as Interights)
Alleged victim:	The author
State party:	Sri Lanka
Date of communication:	19 June 2001 (initial submission)

The Human Rights Committee, established under article 28 of the International Covenant on Civil and Political Rights,

Meeting on 21 July 2004,

Having concluded its consideration of communication No. 1033/2001, submitted to the Human Rights Committee on behalf of Mr. Nallaratnam Singarasa under the Optional Protocol to the International Covenant on Civil and Political Rights,

Having taken into account all written information made available to it by the author of the communication, and the State party,

Adopts the following:

Views under article 5, paragraph 4, of the Optional Protocol

1.1 The author of the communication is Mr. Nallaratnam Singarasa, a Sri Lankan national, and a member of the Tamil community. He is currently serving a 35 year sentence at Boosa Prison, Sri Lanka. He claims to be a victim of violations of articles 14, paragraphs 1, 2, 3 (c), (f), (g), and 5, and 7, 26, and 2, paragraphs 1, and 3, of the International Covenant on Civil and Political Rights. He is represented by counsel, Mr. V.S. Ganesalingam of Home for Human Rights as well as Interights.

1.2 The International Covenant on Civil and Political Rights entered into force for the State party on 11 September 1980 and the first Optional Protocol on 3 January 1998.

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* The following members of the Committee participated in the examination of the present communication: Mr. Prafullachandra Natwarlal Bhagwati, Ms. Christine Chanet, Mr. Franco Depasquale, Mr. Maurice Glèlè Ahanhanzo, Mr. Walter Kälin, Mr. Ahmed Tawfik Khalil, Mr. Rajsoomer Lallah, Mr. Rafael Rivas Posada, Sir Nigel Rodley, Mr. Martin Scheinin, Mr. Ivan Shearer, Mr. Hipólito Solari Yrigoyen and Mr. Roman Wieruszewski.

Facts as submitted by the author

2.1 On 16 July 1993, at about 5 a.m., the author was arrested, by Sri Lankan security forces while sleeping at his home. One hundred and fifty Tamil men were also arrested in a "round up" of his village. None of them were informed of the reasons for their arrest. They were all taken to the Komathurai Army Camp and accused of supporting the Liberation Tigers of Tamil Eelam (known as "the LTTE"). During his detention at the camp, the author's hands were tied together, he was kept hanging from a mango tree, and was allegedly assaulted by members of the security forces.

2.2 On the evening of 16 July 1993, the author was handed over to the Counter Subversive Unit of the Batticaloa Police and detained "in the army detention camp of Batticaloa Prison". He was detained pursuant to an order by the Minister of Defence under section 9 (1) of the Prevention of Terrorism Act No. 48 of 1979 (as amended by Act No. 10 of 1982 and No. 22 of 1988) (hereinafter "the PTA"), which provides for detention without charge up to a period of 18 months (renewable by order every 3 months), if the Minister of Defence "has reason to believe or suspect that any person is connected with or concerned in any unlawful activity".[1] The detention order was not served on the author and he was not informed of the reasons for his detention.

2.3 During the period from 17 July to 30 September 1993, three policemen including a Police Constable (hereinafter "the PC") of the Criminal Investigation Department (hereinafter "the CID"), assisted by a former Tamil militant, interrogated the author. For two days after his arrest, he alleges that he was subjected to torture and ill-treatment, which included being pushed into a water tank and held under water, and then blindfolded and laid face down and assaulted. He was questioned in broken Tamil by the police officers. He was held in incommunicado detention and was not afforded legal representation or interpretation facilities; nor was he given any opportunity to obtain medical assistance. On 30 September 1993, the author allegedly made a statement to the police.

2.4 Sometime in August 1993, the author was first brought before a magistrate, and remanded back into police custody. He remained in remand pending trial, without any possibility of seeking or obtaining bail, pursuant to section 15 (2) of the PTA.[2] The Magistrate did not review the detention order, pursuant to section 10 of the PTA, which states that a detention order under section 9 of the PTA is final and shall not be called in question before any court.[3]

2.5 On 11 December 1993, the author was produced before the Assistant Superintendent of Police (hereinafter "the ASP") of the CID and the same PC who had previously interrogated him. He was asked numerous personal questions about his education, employment and family. As the author could not speak Sinhalese, the PC interpreted between Tamil and Sinhalese. The author was then requested to sign a statement, which had been translated and typed in Sinhalese by the PC. The author refused to sign as he could not understand it. He alleges that the ASP then forcibly put his thumbprint on the typed statement. The prosecution later produced this statement as evidence of the author's alleged confession. The author had neither external interpretation nor legal representation at this time.

2.6 In September 1994, after over 14 months in detention, the author was indicted in the High Court in three separate cases.

(a) On 5 September 1994, he was indicted in case No. 6823/94, together with several named and un-named persons, of having committed an offence under sections 2 (2) (ii), read together with section 2 (1) (f) of the PTA, of having caused "violent acts to take place, namely, receiving armed combat training under the LTTE Terrorist Organisation", at Muttur, between 1 January and 31 December 1989.

(b) On 28 September 1994, he was indicted in case No. 6824/94, together with several other named persons and persons unknown, of having committed an offence under section 2 (1) (a), read together with section 2 (2) (i), of the PTA, of having caused the death of army officers at Arantawala, between 1 and 30 November 1992.

(c) On 30 September 1994, he was indicted in case No. 6825/94, together with several other named persons and persons unknown, on five counts, the first under section 23 (a) of the State of Emergency (Miscellaneous Provisions and Powers) Regulations No. 1 of 1989 with the Public Security (Amendment) Act No. 28 of 1988, of having conspired by unlawful means to overthrow the lawfully constituted Government of Sri Lanka, and the remaining four under section 2 (2) (ii), read together with section 2 (1) (c), of the PTA, of having attacked four army camps (at Jaffna Fort, Palaly, Kankesanthurai and Elephant Pass, respectively), with a view to achieving the objective set out in count one.

2.7 On the date of submission of the communication, the author had not been tried in cases Nos. 6823/94 and 6824/94.

2.8 On 30 September 1994, the High Court assigned the author State-appointed counsel. This was the first time the author had access to a legal representative since his arrest. He later retained private counsel. He had interpretation facilities throughout the legal proceedings; he pleaded not guilty to the charges.

2.9 On 12 January 1995, in an application to the High Court, defence counsel submitted that there were visible marks of assault on the author's body, and moved for a medical report to be obtained. On the Court's order, a Judicial Medical Officer then examined him. According to the author, the medical report stated that the author displayed scars on his back and a serious injury, in the form of a corneal scar on his left eye, which resulted in permanent impairment of vision. It also stated that "injuries to the lower part of the left back of the chest and eye were caused by a blunt weapon while that to the mid back of the chest was probably due to application of sharp force".

2.10 On 2 June 1995, the author's alleged confession was the subject of a voir dire hearing by the High Court, at which the ASP, PC and author gave evidence, and the medical report was considered. The High Court concluded that the confession was admissible, pursuant to section 16 (1) of the PTA, which renders admissible any statement made before a police officer not below the rank of an ASP, provided that it is not found to be irrelevant under section 24 of the Evidence Ordinance. Section 16 (2) of the PTA put the burden of proof that any such statement is irrelevant on the accused.[4] The Court did not find the confession irrelevant, despite defence counsel's motion to exclude it on the grounds that it was extracted from the author under threat.

2.11 According to the author, the High Court gave no reasons for rejecting the medical report despite noting itself that there were "injury scars presently visible on the [author's] body" and acknowledging that these were sequels of injuries "inflicted before or after this incident". In holding that the confession was voluntary, the High Court relied upon the author's failure to complain to anyone at any time about the beatings, and found that his failure to inform the Magistrate of the assault indicated that he had not behaved as a "normal human being." It did not consider the author's testimony that he had not reported the assault to the Magistrate for fear of reprisals on his return to police custody.

2.12 On 29 September 1995, the High Court convicted the author on all five counts, and on 4 October 1995, sentenced him to 50 years' imprisonment. The conviction was based solely on the alleged confession.

2.13 On 9 October 1995, the author appealed to the Court of Appeal, seeking to set aside his conviction and sentence. On 6 July 1999, the Court of Appeal affirmed the conviction but reduced the sentence to a total of 35 years. On 4 August 1999, the author filed a petition for special leave to appeal in the Supreme Court of Sri Lanka, on the ground that certain matters of law arising in the Court of Appeal's judgement should be considered by the Supreme Court.[5] On 28 January 2000, the Supreme Court of Sri Lanka refused special leave to appeal.

The complaint

3.1 The author claims a violation of article 14, paragraph 1, of the Covenant, as he was convicted by the High Court on the sole basis of his alleged confession, which is alleged to have been made in circumstances amounting to a violation of his right to a fair trial. Basic procedural guarantees that safeguard the reliability of a confession and its voluntariness were omitted in this case. In particular, the author submits that his right to a fair trial was breached by the domestic courts' failure to take into consideration the absence of counsel and the lack of interpretation while making the alleged confession, and the failure to record the confession or to employ any other safeguards to ensure that it was given voluntarily. The author submits that the appellate courts' failure to consider these issues is inconsistent with the right to a fair trial and argues that the trial court's failure to consider other exculpatory evidence, in preference to reliance on the confession, is indicative of its lack of impartiality and the manifestly arbitrary nature of the decision. He adds that it was incumbent upon the appellate courts to intervene in this situation where evidence was simply disregarded.

3.2 The author claims that the delay of four years between his conviction and denial of leave to appeal to the Supreme Court amounted to a violation of article 14, paragraph 3 (c). He claims a violation of article 14, paragraph 3 (f), as he was not provided with a qualified and external interpreter when he was questioned by the police. He could neither speak nor read Sinhalese, and without an interpreter was unable adequately to understand the questions put to him or the statements, which he was allegedly forced to sign.

3.3 The author claims that reliance on his confession, in the given circumstances, and in a situation in which the burden was on him to prove that the confession was not made voluntarily, rather than on the prosecution to prove that it was made voluntarily, amounts to a violation of his rights under article 14, paragraph 3 (g). To him, this provision requires that the prosecution prove their case without resort to evidence "obtained through coercion or oppression in defiance of the will of the accused", and prohibits treatment, which violates the rights of detainees to be treated with respect for the inherent dignity of the human person.[6] He invokes the Committee's general comment No. 20, which states that "the law must prohibit the use or admissibility in judicial proceedings of statements or confessions obtained through torture or other prohibited treatment", and observes that measures required in this respect would include, inter alia, provisions against incommunicado detention, and prompt and regular access to lawyers and doctors. [7]

3.4 The author claims a violation of article 14, paragraph 2, as, in light of the existence of the confession, which was considered a voluntary one, the onus was placed on the author to establish his innocence and therefore was not treated as innocent until proven guilty as required by this provision. The author claims that section 16 (2) of the PTA shifts the burden on the accused to prove that any statement, including a confession, was not made voluntarily and therefore should be excluded as evidence, and as such is itself incompatible with article 14, paragraph 2. In particular, where the confession was elicited without safeguards and with complaints of torture and ill-treatment, the application of section 16 (2) of the PTA amounts to a violation of article 14, paragraph 2. The author claims a violation of article 14, paragraph 5, because of the decision of the Court of Appeal to uphold the conviction despite the above-mentioned "irregularities".

3.5 Article 7 is said to have been violated with respect to the treatment described in paragraphs 2.1 and 2.3 above. On account of *ratione temporis* considerations (see paragraph 3.11), the author submits that the torture is principally relevant to the fair trial issues, addressed above. However, in addition, it is submitted that there is a continuing violation of the rights protected by article 7, insofar as Sri Lankan law provides no effective remedy for the torture and ill-treatment to which the author was already subjected. The author submits that, both through its law and practice, the State party condones such violations, contrary to article 7, read together with the positive duty to ensure the rights protected in article 2, paragraph 1, of the Covenant.

3.6 The author claims that the decision to admit the confession, obtained through alleged violations of his rights, and to rely on it as the sole basis for his conviction, violated his rights under article 2, paragraph 1, as the State party failed to "ensure" his Covenant rights. It is also claimed that the application of the PTA itself violated his rights under articles 14, and 2, paragraph 1.

3.7 The author claims a violation of article 2, paragraph 3, read together with articles 7 and 14, as the constitutional bar to challenging sections 16 (1) and (2) of the PTA effectively denies the author an effective remedy for the torture to which he was subjected and his unfair trial. The PTA provides for the admissibility of extrajudicial confessions obtained in police custody and in the absence of counsel, and places the burden of proving that such a confession was made "under threat" on the accused.[8] In this way, the law itself has created a situation where rights under article 7 may be violated without any remedy available. The State must enforce the prohibition on torture and ill-treatment, which includes taking "effective legislative, administrative, judicial and other measures to prevent torture in any territory under its jurisdiction".[9] Thus, if in practice legislation encourages or facilitates violations, then at a minimum this falls foul of the positive duty to take all necessary measures to prevent torture and inhuman punishment. The author claims a separate violation of article 2, paragraph 3, alone, as the explicit ban under Sri Lankan law on constitutional challenges to enacted legislation prevented the author from challenging the operation of the PTA.

3.8 The author claims that the trial and appellate courts' failure to exclude the author's alleged confession, despite its having been made in the absence of a qualified and independent interpreter, amounted to a breach of his right not to be discriminated against under article 2, paragraph 1, read together with article 26. He claims that the application of the PTA resulted in, and continues to cause, indirect discrimination against members of the Tamil minority, including himself.

3.9 The author claims a violation of article 14, paragraph 3 (c), in relation to cases Nos. 6823/94 and 6824/94, as he was detained pending trial for over seven years since his initial indictments (eight since his arrest), and had not been tried on the date of submission of his communication.

3.10 The author submits that he has exhausted domestic remedies, as he was denied leave to appeal to the Supreme Court. As regards constitutional remedies, he notes that the Sri Lankan Constitution (art. 126 (1)) only permits judicial review of executive or administrative action, it explicitly prohibits any constitutional challenge to legislation already enacted (art. 16, art. 80 (3) and art. 126 (1)).[10] The courts have similarly held that judicial review of judicial action is not permissible.[11] Thus, he was unable to seek judicial review of any of the judicial orders applicable to his case, or to challenge the constitutionality of the provisions of the PTA, which authorized his detention pending trial (in respect of cases Nos. 6823/94 and 6824/94), the admissibility of his alleged confession, and the shifted burden of proof regarding the admissibility of the confession.

3.11 The author argues that the communication is admissible *ratione temporis*. In respect of case No. 6825/94, the Court of Appeal's judgement of 6 July 1999, which upheld the author's conviction, and the Supreme Court of Sri Lanka's denial of leave to appeal, on 28 January 2000 refusing leave to appeal, were both given after the First Optional Protocol came into force for Sri Lanka. He submits that the right to a fair trial comprises all stages of the criminal process, including appeal, and the due process guarantees in article 14 apply to the process as a whole. The alleged violations of the rights protected under article 14, by the Court of Appeal, are the primary basis for this communication. His claims are said to be admissible *ratione temporis* inasmuch as they relate to continuing violations of his rights under the Covenant. He argues that the denial of a right to a remedy in relation to the claims under article 2, paragraph 3, read together with articles 7 and 14 (para. 3.7), continues. As to his claims under article 14, the author remains incarcerated without prospect of release or retrial, which amounts to a continuing violation of his right not to be subjected to prolonged detention without a fair trial. With respect to cases Nos. 6823/94 and 6824/94, the author submits that he has remained incarcerated pending trial for a total of eight years at the time of submission of his communication, three of which were after the entry into force of the Optional Protocol.

3.12 Regarding a remedy, the author submits that release is the most appropriate remedy for a finding of the violations alleged herein, as well as the provision of compensation, pursuant to article 14, paragraph 6, of the Covenant.

The State party's submissions on admissibility and merits

4.1 By submission of 4 April 2002, the State party argues that the communication is inadmissible *ratione personae*. It submits that it did not receive a copy of the power of attorney and if it were to receive same it would have to check its "validity and applicability". Even if the authorization were presented to the State party, it submits that an author must personally submit a communication unless he can prove that he is unable to do so. The author provided no reason to demonstrate that he is unable to present such an application himself.

4.2 The State party argues that the author did not exhaust domestic remedies. Firstly, he could have requested the President for a pardon, to grant any respite of the execution of sentence, or to substitute a less severe form of punishment, as he is empowered to do under article 34 (1) of the Constitution. Secondly, he could also have applied to the Supreme Court under article 11 of the Constitution, which prevents torture or other cruel, inhuman or degrading treatment or punishment, about his allegations of torture by army personnel and police officers. Such action would constitute "executive action" in terms of articles 17 and 26 of the Constitution.[12] If the Supreme Court had found that the author was subjected to torture, it could have made a declaration that his rights under article 11 had been violated, ordered payment of compensation by the State, payment of costs of the legal proceedings and, if warranted, ordered the immediate release of the author.

4.3 Thirdly, the State party submits that the author could have complained to the police, alleging that he was subjected to torture as defined by section 2, read together with section 12, of the Convention against Torture. Criminal proceedings could then have been instituted in the High Court by the Attorney-General. Fourthly, he could have instituted criminal proceedings directly against the perpetrators of the alleged torture in the Magistrates Court, pursuant to section 136 (1) (a) of the Code of Criminal Procedure Act (No. 15 of 1979). If the Supreme Court had found that the author was subjected to torture or if criminal proceedings had been instituted against the alleged perpetrators, he would either not have been indicted or criminal proceedings, already instituted, would have been terminated.

4.4 With respect to the complaint that his rights under article 14, paragraph 3 (c), were violated as he was detained pending trial in cases Nos. 6823 and 6825, both of which have not yet come to trial, the State party submits that the author could have petitioned the Supreme Court, and complained of a violation, by "executive action" of his "fundamental rights", guaranteed by articles 13 (3), and/or (4), of the Constitution. Such a finding by the Supreme Court could have led to the indictments being quashed or the author's release.

4.5 In its merits submission of 20 November 2002, the State party denies that any of the author's rights under the Covenant were violated or that any provisions of the State of Emergency (Miscellaneous Provisions and Powers) Regulations No. 1 of 1989 (which are promulgated under the Public Security Ordinance) or the PTA violate the Covenant. With respect to the claims under article 14, it submits that the author received a fair and public hearing before a competent, independent and impartial tribunal established by law; he was afforded the presumption of innocence, which is secured under domestic law and recognized as a constitutional right.

4.6 On the issue of access to an interpreter, the State party submits that a person conversant in both Tamil and Sinhalese was present when the author's confession was recorded. This translator was called by the prosecution as a witness during the trial, during which the author had the opportunity to cross-examine him and also to test his knowledge and competency. The State party submits that it was only after this evidence was recorded, during the *voir dire* hearing, that the Court accepted the confession as part of the evidence in the trial. It adds that the author had the free assistance of an interpreter conversant in Tamil during the trial and was also represented by a lawyer of his choice, who was also conversant in Tamil.

4.7 The State party submits that the author had the right to remain silent, or to make an unsworn statement from the dock or to give sworn evidence from the witness stand which could be cross-examined. It denies that he was compelled to testify at trial, to testify against himself or to confess guilt. Rather he elected to give evidence and on doing so the Court was entitled to consider such evidence in arriving at its verdict. The State party explains that under the Sri Lankan Evidence Ordinance, a statement made to a police officer is inadmissible, but under the PTA, a confession made to a police officer not below the rank of ASP is admissible, provided that such statement is not irrelevant under section 24 of the Evidence Ordinance.[13] The voluntariness of such a statement or confession, before admission, may be challenged. Although the burden of proving its case, beyond a reasonable doubt, rests with the prosecution, the burden of proving that a confession was not made voluntarily lies with the person claiming it. According to the State party, this is consistent with "the universally accepted principle of law, namely, he who asserts must prove" and, the reliance on confessions does not amount to a violation of article 14, paragraph 3 (g), of the Covenant, and is permissible under the Constitution. It argues that the burden on an accused to prove that a confession was made under duress is not beyond reasonable doubt but in fact is "placed very low", and requires the accused to "show only a mere possibility of involuntariness".

4.8 On the claim of torture, the State party submits that the trial court and the Court of Appeal made clear and unequivocal findings that these allegations were inconsistent with the medical report adduced in evidence, and that the author had failed to make such allegations to the Magistrate or to the police, prior to the trial.

4.9 On the claim of alleged discrimination with regard to the manner in which the confession made by the author was recorded and considered by the Court, the State party reiterates its arguments raised on the circumstances surrounding his confession, in paragraph 4.6 above. On the issue of a violation of article 14, paragraph 5, it notes that the author was afforded every opportunity to have his conviction and sentence reviewed by a tribunal according to law, and that he merely seeks to question the findings of fact made by the domestic courts before the Committee. Finally, the State party informs the Committee that, following the author's conviction in case No. 6825/94, the charges in cases Nos. 6823/94 and 6824/94 were withdrawn.

The author's comments

5.1 Regarding the State party's argument that the communication is inadmissible *ratione personae*, the author submits that the power of attorney was included in the submission, and notes that his imprisonment prevented him from submitting the communication personally. He adds that it is common practice for the Committee to accept communications from third parties, acting in respect of individuals incarcerated in prison.

5.2 On the issue of exhaustion of domestic remedies, the author submits that the obligation to exhaust all available domestic remedies does not extend to non-judicial remedies and a Presidential pardon which, as an extraordinary remedy, is based upon executive discretion and thus does not amount to an effective remedy, for the purposes of the Optional Protocol.

5.3 The author reaffirms he was unable to seek constitutional remedies in respect of any of the judicial orders or relevant legislation relating to the admissibility of the alleged confession, or detention pending trial, given that the Sri Lankan Constitution does not permit judicial review of judicial action, or of enacted legislation. Thus, he could not pursue constitutional remedies in respect of the decision of the domestic courts to admit the alleged confession, or domestic legislation which renders admissible statements made before the police and places the burden of proof regarding the irrelevance of such statements on the accused.

5.4 On whether the author could have sought to have the perpetrators of the alleged torture prosecuted, he submits that the obligation to exhaust domestic remedies does not extend to remedies which are inaccessible, ineffective in practice, or likely to be unduly prolonged. He recalls that the applicable laws do not conform to international standards and in particular to the requirements of article 7 of the Covenant. Consequently, remedies against torture are ineffective. The author did not file a criminal complaint that the alleged confession was extracted from him under torture, given his fear of repercussions while he remained in custody. He notes that when he placed these allegations on record, during the *voir dire* hearing before the High Court, no investigations were initiated.

5.5 On the issue of exhaustion of domestic remedies, in relation to the author's detention pending trial and the delay in trial, the author submits that only "available remedies" must be exhausted. There is no specific right to a speedy trial under the Constitution, and, to date, the courts have not interpreted the right to a fair trial as including the right to an expeditious trial. Furthermore, the Constitution explicitly provides for the possibility of detention pending trial and, in any event, stipulates that constitutional remedies are not applicable to judicial decisions, for example when a court decides to grant frequent adjournments at the request of the prosecution, leading to trial delays.

5.6 On the merits, the author reiterates the arguments in his initial communication. With respect to the information provided by the State party on cases Nos. 6823/94 and 6824/94, the author confirms that the charges relating to the former case have been withdrawn and therefore "provides no further submissions in respect of these proceedings". However, no information is available on whether the charges in the latter case have been dropped, and the author submits that he may still be brought to trial on this charge.

Issues and proceedings before the Committee

Consideration of admissibility

6.1 Before considering any claim contained in the communication, the Human Rights Committee must, in accordance with rule 87 of its rules of procedure, decide whether or not it is admissible under the Optional Protocol to the Covenant. The Committee has ascertained, as required under article 5, paragraph 2 (a), of the Optional Protocol, that the matter is not being examined under another procedure of international investigation or settlement.

6.2 As to the question of standing and the State party's argument that author's counsel had no authorization to represent him, the Committee notes that it has received written evidence of the representative's authority to act on the author's behalf and refers to rule 90 (b) of its rules of procedure, which provides for this possibility. Thus, the Committee finds that the author's representative does have standing to act on the author's behalf and the communication is not considered inadmissible for this reason.

6.3 Although the State party has not argued that the communication is inadmissible *ratione temporis*, the Committee notes that the violations alleged by the author occurred prior to the entry into force of the Optional Protocol. The Committee refers to its prior jurisprudence and reiterates that it is precluded from considering a communication if the alleged violations occurred before the entry into force of the Optional Protocol, unless the alleged violations continue or have continuing effects which in themselves constitute a violation of the Covenant. A continuing violation is to be interpreted as an affirmation, after the entry into force of the Optional Protocol, by act or by clear implication, of previous violations of the State party.[14] The Committee observes that although the author was convicted at first instance on 29 September 1995, i.e. before the entry into force of the Optional Protocol for the State party, the judgement of the Court of Appeal upholding the author's conviction, and the Supreme Court's order refusing leave to appeal were both rendered on 6 July 1999 and 28 January 2000, respectively, after the Optional Protocol came into force. The Committee considers the appeal courts decision, which confirmed the trial courts conviction, as an affirmation of the conduct of the trial. In the circumstances, the Committee concludes that it is not precluded *ratione temporis* from considering this communication. However, as to the author's claims under article 26, article 2, paragraph 1 alone and read together with article 14, and his claim under article 9, paragraph 3, relating to his automatic remand in detention without bail, the Committee finds these claims inadmissible *ratione temporis*.

6.4 With respect to the State party's argument that the author did not exhaust domestic remedies in failing to request a Presidential pardon, the Committee reiterates its previous jurisprudence that such pardons constitute an extraordinary remedy and as such are not an effective remedy for the purposes of article 5, paragraph 2 (b), of the Optional Protocol.

6.5 Having regard to the author's claim of a violation of article 7 and considering it as limited to torture raising fair trial issues, the Committee notes that this issue was considered by the Appellate Courts and dismissed for lack of merit. On this basis, and considering that the author was refused leave to appeal to the Supreme Court, the Committee finds that the author has exhausted domestic remedies.

6.6 As to the claim of a violation of article 14, paragraph 5, as the Court of Appeal upheld the author's conviction, despite alleged "irregularities" during the trial, the Committee notes that this provision provides for the right to have a conviction and sentence reviewed by a higher tribunal. As it is uncontested that the author's conviction and sentence were reviewed by the Court of Appeal, the fact that the author disagrees with the outcome of the court's decision is not sufficient to bring the issue within the scope of article 14, paragraph 5. Consequently, the Committee finds that this claim is inadmissible *ratione materiae*, under article 3 of the Optional Protocol.

6.7 The Committee therefore proceeds to the consideration of the merits of the communication regarding the claims of torture as limited in paragraph 6.4 above and unfair trial - article 14 alone and read with article 7.

Consideration of the merits

7.1 The Committee has examined the communication in light of all the information made available to it by the parties, as provided for in article 5, paragraph 1, of the Optional Protocol.

7.2 As to the claim of a violation of article 14, paragraph 3 (f), due to the absence of an external interpreter during the author's alleged confession, the Committee notes that this provision provides for the right to an interpreter during the court hearing only, a right which was granted to the author.[15] However, as clearly appears from the court proceedings, the confession took place in the sole presence of the two investigating officers - the Assistant Superintendent of Police and the Police Constable; the latter typed the statement and provided interpretation between Tamil and Sinhalese. The Committee concludes that the author was denied a fair trial in accordance with article 14, paragraph 1, of the Covenant by solely relying on a confession obtained in such circumstances.

7.3 As to the delay between conviction and the final dismissal of the author's appeal by the Supreme Court (29 September 1995 to 28 January 2000) in case No. 6825/1994, which has remained unexplained by the State party, the Committee notes with reference to its *ratione temporis* decision in paragraph 6.3 above, that more than two years of this period, from 3 January 1998 to 28 January 2000, relate to the time after the entry into force of the Optional Protocol. The Committee recalls its jurisprudence that the rights contained in article 14, paragraphs 3 (c), and 5, read together, confer a right to review of a decision at trial without delay.[16] In the circumstances, the Committee considers that the delay in the instant case violates the author's right to review without delay and consequently finds a violation of article 14, paragraphs 3 (c), and 5 of the Covenant.

7.4 On the claim of a violation of the author's rights under article 14, paragraph 3 (g), in that he was forced to sign a confession and subsequently had to assume the burden of proof that it was extracted under duress and was not voluntary, the Committee must consider the principles underlying the right protected in this provision. It refers to its previous jurisprudence that the wording, in article 14, paragraph 3 (g), that no one shall "be compelled to testify against himself or confess guilt", must be understood in terms of the absence of any direct or indirect physical or psychological coercion from the investigating authorities on the accused with a view to obtaining a confession of guilt.[17] The Committee considers that it is implicit in this principle that the prosecution prove that the confession was made without duress. It further notes that pursuant to section 24 of the Sri Lankan Evidence Ordinance, confessions extracted by "inducement, threat or promise" are inadmissible and that in the instant case both the High Court and the Court of Appeal considered evidence that the author had been assaulted several days prior to the alleged confession. However, the Committee also notes that the burden of proving whether the confession was voluntary was on the accused. This is undisputed by the State party since it is so provided in section 16 of the PTA. Even if, as argued by the State party, the threshold of proof is "placed very low" and "a mere possibility of involuntariness" would suffice to sway the court in favour of the accused, it remains that the burden was on the author. The Committee notes in this respect that the willingness of the courts at all stages to dismiss the complaints of torture and ill-treatment on the basis of the inconclusiveness of the medical certificate (especially one obtained over a year after the interrogation and ensuing confession) suggests that this threshold was not complied with. Further, insofar as the courts were prepared to infer that the author's allegations lacked credibility by virtue of his failing to complain of ill-treatment before its

Magistrate, the Committee finds that inference to be manifestly unsustainable in the light of his expected return to police detention. Nor did this treatment of the complaint by its courts satisfactorily discharge the State party's obligation to investigate effectively complaints of violations of article 7. The Committee concludes that by placing the burden of proof that his confession was made under duress on the author, the State party violated article 14, paragraphs 2, and 3 (g), read together with article 2, paragraph 3, and 7 of the Covenant.

7.5 The Human Rights Committee, acting under article 5, paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights, is of the view that the facts before it disclose violations of articles 14, paragraphs 1, 2, 3, (c), and 14, paragraph (g), read together with articles 2, paragraph 3, and 7 of the Covenant.

7.6 In accordance with article 2, paragraph 3 (a), of the Covenant, the State party is under an obligation to provide the author with an effective and appropriate remedy, including release or retrial and compensation. The State party is under an obligation to avoid similar violations in the future and should ensure that the impugned sections of the PTA are made compatible with the provisions of the Covenant.

7.7 Bearing in mind that, by becoming a State party to the Optional Protocol, the State party has recognized the competence of the Committee to determine whether there has been a violation of the Covenant or not and that, pursuant to article 2 of the Covenant, the State party has undertaken to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the Covenant, the Committee wishes to receive from the State party, within 90 days, information about the measures taken to give effect to its Views. The State party is also requested to publish the Committee's Views.

[Adopted in English, French and Spanish, the English text being the original version. Subsequently to be issued also in Arabic, Chinese and Russian as part of the present report.]

Notes

[1] Section 9 (1) of the PTA provides as follows: "Where the Minister has reason to believe or suspect that any person is connected with or concerned in any unlawful activity, the Minister may order that such person be detained for a period not exceeding three months in the first instance, in such place and subject to such conditions as may be determined by the Minister, and any such order may be extended from time to time for a period not exceeding three months at a time."

[2] Section 15 (2) of the PTA (as amended by Act 10 of 1982) provides as follows: "Upon the indictment being received in the High Court against any person in respect of any offence under this Act or any offence to which the provisions of section 23 shall apply, the Court shall, in every case, order the remand of such person until the conclusion of the trial." The author makes no specific claim with respect to this issue.

[3] Section 10 of the PTA provides as follows: "An order made under section 9 shall be final and shall not be called into question in any court or tribunal by way of writ or otherwise."

[4] Section 16 of the PTA provides as follows: "(1) Notwithstanding the provisions of any other law, where any person is charged with an offence under this Act, any statement made by such person at any time, whether - (a) it amounts to a confession or not; (b) made orally or reduced to writing; (c) such person was or was not in custody or presence of a police officer; (d) made in the course of an investigation or not; (e) it was or was not wholly or partly in answer to any question, may be proved as against such person if such statement is not irrelevant under section 24 of the Evidence Ordinance: provided however, that no such statement shall be proved as against such person if such statement was made to a police officer below the rank of an Assistant Superintendent." (2) The burden of proving that any statement referred to in subsection (1) is irrelevant under section 24 of the Evidence Ordinance shall be on the person asserting it to be irrelevant. (3) Any statement admissible under subsection (1) may be proved as against any other person charged jointly with the person making the statement, if and only if, such statement is corroborated in material particulars by evidence other than the statements referred to in subsection (1). (emphasis added)

The author notes that section 17 of the PTA further provides that sections 25, 26 and 30 of the Evidence Ordinance, which include additional restrictions on the admissibility of confessions, are not applicable in any proceedings under the PTA. Section 24 of the Evidence Ordinance provides as follows: "A confession made by an accused person is irrelevant in a criminal proceeding if the making of the confession appears to the court to have been caused by any inducement, threat or promise having reference to the charge against the accused person, proceeding from a person in authority or proceeding from another person in the presence of a person in authority and with his sanction, and which inducement, threat or promise is sufficient in the opinion of the court to give the accused person grounds which would appear to him reasonable for supposing that by making it he would gain any advantage or avoid any evil of a temporal nature in reference to the proceedings against him."

[5] Article 128 of the Constitution permits appeal to the Supreme Court only on matters of law.

[6] *Saunders v. UK* (1996) 23 EHRR 313, CCPR general comment No. 13, of 13 April 1984; *Kelly v. Jamaica*, case No. 253/87, Views adopted on 4 August 1991.

[7] CCPR general comment No. 20, of 10 March 1992.

[8] In this respect, the author notes that the recent report of the United Nations Special Rapporteur on summary and extrajudicial executions refers to repeated allegations of confessions being extracted under torture from persons accused of offences under the PTA Report by Special Rapporteur, Mr. Bacre Waly Ndiaye, Addendum, submitted pursuant to Commission on Human Rights resolution 1997/61, E/CN.4/1998/68/Add.2, 12 March 1998.

[9] Article 2, paragraph 1, of the Convention against Torture.

[10] Article 126 (1), Constitution of Sri Lanka provides as follows: "The Supreme Court shall have sole and exclusive jurisdiction to hear and determine any question relating to the infringement or imminent infringement by executive or administrative action of any fundamental right." (emphasis added). Article 16 (1) of the Constitution provides: "All existing written and unwritten law shall be valid and operative notwithstanding any inconsistency with the preceding

provisions of this chapter [Chapter III on Fundamental Rights]." Further, article 80 (3) Constitution of Sri Lanka provides: "No court or tribunal shall inquire into, pronounce upon or in any manner call in question, the validity of [any Act of Parliament] on any ground whatsoever." As a former Chief Justice of Sri Lanka, Justice S. Sharvananda, has commented (see Justice S. Sharvananda, *Fundamental Rights in Sri Lanka*, (Sri Lanka: 1993) at p. 140): "article 80 (3) vests enacted law with finality in the sense that the validity of an Act of Parliament cannot be called in question in any court or tribunal. In this Constitutional scheme, there is no room for the introduction of the concept of 'due process of law' or notions of reasonableness of the law and natural justice as has been done by the Supreme Court of India in Maneka Gandhi's case A.I.R. (1978) SC 597 at 691-692. As stated earlier, in Sri Lanka, it is not open to a court to invalidate a law on the ground that it seeks to deprive a person of his liberty contrary to the court's notions of justice or due process."

[11] *Velmurugu v. AG* (1981) 1 SLR 406; *Saman v. Leeladasa* SC Appl. No. 4/88 SC Minutes 12 December 1988.

[12] Article 17 provides that, "every person shall be entitled to apply to the Supreme Court, as provided by article 126, in respect of the infringement or imminent infringement, by executive or administrative action, of a fundamental right to which such person is entitled under the provisions of this chapter". Article 26 provides that, "the Supreme Court shall have sole and exclusive jurisdiction to hear and determine any question relating to the infringement or imminent infringement by the executive or administrative action of any fundamental right or language right declared and recognized by chapter III or chapter IV".

[13] Section 28 provides that, "The provisions of this Act (Prevention of Terrorism Act) shall have effect not withstanding anything contained in any other written law and accordingly in the event of any conflict or inconsistency between the provisions of this Act and such other written law the provisions of this Act shall prevail".

[14] *E. and A.K. v. Hungary*, case No. 520/1992, decision of 7 April 1994, and *K.V. and C.V. v. Germany*, case No. 568/1993, decision of 8 April 1994, *Holland v. Ireland*, case No. 593/1994, decision of 26 October 1996.

[15] *B.d.B. v. Netherlands*, case No. 273/1988, decision of 30 March 1989, and *Yves Cadoret v. France*. case No. 221/1987, decision of 11 April 1991 and *Herve Le Bihan v. France*, case No. 323/1988, decision of 9 November 1989.

[16] *Lubuto v. Zambia*, case No. 390/1990, Views adopted on 31 October 1995;
Neptune v. Trinidad and Tobago, case No. 523/1992, Views adopted on 16 July 1996;
Sam Thomas v. Jamaica, case No. 614/95, Views adopted on 31 March 1999;
Clifford McLawrence v. Jamaica, case No. 702/96, Views adopted on 18 July 1997;
Johnson v. Jamaica, case No. 588/1994, Views adopted on 22 March 1996.

[17] *Berry v. Jamaica*, case No. 330/1988, Views adopted on 4 July 1994.

BB. Communication No. 1051/2002, *Ahani v. Canada* (Views adopted on 29 March 2004, eightieth session)*

Submitted by:	Mansour Ahani (represented by counsel, Ms. Barbara L. Jackman)
Alleged victim:	The author
State party:	Canada
Date of communication:	10 January 2002 (initial submission)

The Human Rights Committee, established under article 28 of the International Covenant on Civil and Political Rights,

Meeting on 29 March 2004,

Having concluded its consideration of communication No. 1051/2002, submitted to the Human Rights Committee on behalf of Mansour Ahani under the Optional Protocol to the International Covenant on Civil and Political Rights,

Having taken into account all written information made available to it by the author of the communication, and the State party,

Adopts the following:

Views under article 5, paragraph 4, of the Optional Protocol

1.1 The author of the communication, initially dated 10 January 2002, is Mansour Ahani, a citizen of the Islamic Republic of Iran ("Iran") and born on 31 December 1964. At the time of submission, he was detained in Hamilton Wentworth Detention Centre, Hamilton Ontario, pending conclusion of legal proceedings in the Supreme Court of Canada concerning his deportation. He claims to be a victim of violations by Canada of articles 2, 6, 7, 9, 13 and 14 of the International Covenant on Civil and Political Rights. The author is represented by counsel.

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* The following members of the Committee participated in the examination of the present communication: Mr. Abdelfattah Amor, Mr. Nisuke Ando, Mr. Prafullachandra Natwarlal Bhagwati, Mr. Alfredo Castillero Hoyos, Ms. Christine Chanet, Mr. Franco Depasquale, Mr. Maurice Glèlè Ahanhanzo, Mr. Walter Kälin, Mr. Ahmed Tawfik Khalil, Mr. Rafael Rivas Posada, Sir Nigel Rodley, Mr. Martin Scheinin, Mr. Ivan Shearer, Mr. Hipólito Solari Yrigoyen, Ms. Ruth Wedgwood and Mr. Roman Wieruszewski.

Under rule 85 of the Committee's rules of procedure, Mr. Maxwell Yalden did not participate in the examination of the case.

Two separate individual opinions signed by Mr. Nisuke Ando and Ms. Christine Chanet and one combined dissenting opinion signed by Sir Nigel Rodley, Mr. Ivan Shearer and Mr. Roman Wieruszewski are appended to the present document.

1.2 On 11 January 2002, the Committee, acting through its Special Rapporteur on new communications, pursuant to rule 86 of the Committee's rules of procedure, requested the State party, in the event that the Supreme Court's decision expected the same day would permit the author's deportation, "to refrain from deportation until the Committee has had an opportunity to consider the allegations, in particular those that relate to torture, other inhuman treatment or even death as a consequence of the deportation". By note of 17 May 2002, the Committee, having been informed by counsel of a real risk that the State party would not comply with the Committee's request for interim measures of protection, reiterated its request. On 10 June 2002, the State party deported the author to Iran.

The facts as submitted by the author

2.1 On 14 October 1991, the author arrived in Canada from Iran and claimed protection under the Convention on the Status of Refugees and its Protocol, based on his political opinion and membership in a particular social group. He contended, on various occasions, (i) that he had been beaten by members of the Islamic Revolutionary Committee in Iran for being intoxicated, (ii) that his return to Iran would endanger his life due to his knowledge of Iranian covert operations and personnel, knowledge which he had acquired as a forced conscript in the foreign assassins branch of the Iranian Foreign Ministry, (iii) that he had been jailed for four years as a result of refusing to carry out a drug raid which was in fact a raid on the home of an Iranian dissident, with women and children, in Pakistan, and (iv) that he had been released after pretending to repent. On 1 April 1992, the Immigration and Refugee Board determined that the author was a Convention refugee based on his political opinion and membership in a particular social group.

2.2 On 17 June 1993, the Solicitor-General of Canada and the Minister of Employment and Immigration, having considered security intelligence reports stating that the author was trained to be an assassin by the Iranian Ministry of Intelligence and Security ("MIS"), both certified, under section 40 (1) of the *Immigration* Act ("the Act"), that they were of the opinion that the author was inadmissible to Canada under section 19 (1) of the Act as there were reasonable grounds to believe that he would engage in terrorism, that he was a member of an organization that would engage in terrorism and that he had engaged in terrorism. On the same date, the certificate was filed with the Federal Court, while the author was served with a copy of the certificate and, pursuant to section 40 (1) (2) (b) of the Act, he was taken into mandatory detention, where he remained until his deportation nine years later.

2.3 On 22 June 1993, in accordance with the statutory procedure set out in section 40 (1) of the Act for a determination of whether the Ministers' certificate was "reasonable on the basis of the information available", the Federal Court (Denault J) examined the security intelligence reports in camera and heard other evidence presented by the Solicitor-General and the Minister, in the absence of the plaintiff. The Court then provided the author with a summary of the information, required by statute to allow the affected person to be "reasonably" informed of the circumstances giving rise to the certification while being appropriately redacted for national security concerns, and offered the author an opportunity to respond.

2.4 Rather than exercising his right to be heard under this procedure, the author then challenged the constitutionality of the certification procedure and his detention subsequent to it in a separate action before the Federal Court. On 12 September 1995, the Federal Court (McGillis J) rejected his challenge, holding that the procedure struck a reasonable balance between competing interests of the State and the individual, and that the detention upon the Ministers' certification pending the Court's decision on its reasonableness was not arbitrary. The author's further appeals against that decision were dismissed by the Federal Court of Appeal and the Supreme Court on 4 July 1996 and 3 July 1997, respectively.

2.5 Following the affirmation of the constitutionality of section 40 (1) procedure, the Federal Court (Denault J) proceeded with the original reasonableness hearing, and, following extensive hearings, concluded on 17 April 1998 that the certificate was reasonable. The evidence included information gathered by foreign intelligence agencies which was divulged to the Court in camera in the author's absence on national security grounds. The Court also heard the author testify on his own behalf in opposition to the reasonableness of the certificate. The Court found that there were grounds to believe that the author was a member of the MIS, which "sponsors or undertakes directly a wide range of terrorist activities including the assassination of political dissidents worldwide". The Federal Court's decision on this matter was not subject to appeal or review.

2.6 Thereafter, in April 1998, an immigration adjudicator determined that the author was inadmissible to Canada, and ordered the author's deportation. On 22 April 1998, the author was informed that the Minister of Citizenship and Immigration would assess the risk the author posed to the security of Canada, as well as the possible risk that he would face if returned to Iran. The Minister was to consider these matters in deciding under section 53 (1) (b) of the Act[1] (which implements article 33 of the Convention on the Status of Refugees) whether the prohibition on removing a Convention refugee to the country of origin could be lifted in the author's case. The author was accordingly given an opportunity to make submissions to the Minister on these issues.

2.7 On 12 August 1998, the Minister, following representations by the author that he faced a clear risk of torture in Iran, determined, without reasons and on the basis of a memorandum attaching the author's submissions, other relevant documents and a legal analysis by officials, that he (a) constituted a danger to the security of Canada, and (b) could be removed directly to Iran. The author applied for judicial review of the Minister's opinion. Pending the hearing of the application, the author applied for release from detention pursuant to section 40 (1) (8) of the Act, as 120 days has passed from the issue of the deportation order against him.[2]
On 15 March 1999, the Federal Court (Denault J), finding reasonable grounds to believe that his release would be injurious to the safety of persons in Canada, particularly Iranian dissidents, denied the application for release. The Federal Court of Appeal upheld this decision.

2.8 On 23 June 1999, the Federal Court (McGillis J) rejected the author's application for judicial review of the Minister's decision, finding there was ample evidence to support the Minister's decision that the author constituted a danger to Canada and that the decision to deport him was reasonable. The Court also dismissed procedural constitutional challenges, including to the process of the provision of the Minister's danger opinion. On 18 January 2000, the Court of Appeal rejected the author's appeal. It found that "the Minister could rightly conclude that the [author] would not be exposed to a serious risk of harm, let alone torture" if he were deported to Iran. It agreed that there were reasonable grounds to support the allegation that the author was in fact a trained assassin with the Iranian secret service, and that there was no basis upon which to set aside the Minister's opinion that he was a danger to Canada.

2.9 On 11 January 2001, the Supreme Court unanimously rejected the author's appeal, finding that there was "ample support" for the Minister to decide that the author was a danger to the security of Canada. It further found the Minister's decision that he only faced a "minimal risk of harm", rather than a substantial risk of torture, in the event of return to Iran to be reasonable and "unassailable". On the constitutionality of deportation of persons at risk of harm under section 53 (1) (b) of the Act, the Court referred to its reasoning in a companion case of *Suresh v. Canada (Minister of Citizenship and Immigration)*[3] decided the same day, where it held that "barring extraordinary circumstances, deportation to torture will generally violate the principles of fundamental justice". As *Suresh* had established a prima facie risk of torture, he was entitled to enhanced procedural protections, including provision of all information and advice the Minister intended to rely on, receipt of an opportunity to address the evidence in writing and to be given written reasons by the Minister. In the author's case, however, the Court considered that he had not cleared the evidentiary threshold required to make a prima facie case and access these protections. The Court was of the view that the author, in the form of the letter advising him of the Minister's intention to consider his danger to Canada as well as the possible risks to him in the event of expulsion, "was fully informed of the Minister's case against him and given a full opportunity to respond". The process followed, according to the Court, was therefore consistent with principles of fundamental justice and not prejudicial to the author even though it had not followed the *Suresh* requirements.

2.10 The same day, the Committee indicated its request pursuant to rule 86 of its rules of procedure for interim measures of protection, however the State party's authorities proceeded with arrangements to effect removal. On 15 January 2002, the Ontario Superior Court (Dambrot J) rejected the author's argument that the principles of fundamental justice, protected by the *Charter*, prevented his removal prior to the Committee's consideration of the case. On 8 May 2002, the Court of Appeal for Ontario upheld the decision, holding that the request for interim measures was not binding upon the State party. On 16 May 2002, the Supreme Court, by a majority, dismissed the author's application for leave to appeal (without giving reasons). On 10 June 2002, the author was deported to Iran.

The complaint

3.1 In his original communication (preceding expulsion), the author claims that Canada had violated, or would violate if it expelled him, articles 2, 6, 7, 9, 13 and 14 of the Covenant. Firstly, he contends that the statutory and administrative processes to which he was determined are not consistent with the guarantees of articles 2 and 14 of the Covenant. In particular, the discretion of the Minister of Immigration in directing a person's return to a country may be affected by considerations adverse to human rights concerns, including negative media coverage of a case. In addition, the Minister of Immigration's role in the expulsion process is neither independent nor impartial. The author argues that the Minister initially signs a security certificate that a person presents a security threat, defends the certification before the "reasonableness" hearing in Federal Court and prosecutes against the person at the deportation inquiry, all before having to decide whether a person thereafter eligible for expulsion should be expelled. In the author's view, it should not be an elected politician, without giving reasons, making such a decision on a subjective basis, but rather an independent and impartial tribunal.

3.2 The author also argues the process is further procedurally deficient in that it provides insufficient notice of the case against the affected individual. A person is simply advised that immigration officials will recommend to the Minister that a person be subject to expulsion under section 53 (1) of the Act, without reasons provided, and is invited to make submissions. The submissions of the Minister's officials in response to those of the affected person are not provided and thus cannot be rebutted. The absence of any reasons provided in the decision makes judicial review of the decision against the submissions made to the Minister impossible.

3.3 The author further argues that the inability to apply for appeal or review of the Federal Court's "reasonableness" decision on the initial security certificate is deficient. Nor could he raise (fundamental) concerns as to the fairness of the process at the "reasonableness" hearing. He argues the Court does not test the evidence and does not hear independent witnesses. There are no national security reasons warranting a due process exception as, in the author's view, there was no evidence of either a threat by him to Canadian national security or of (even a threat of) criminal conduct in Canada. In the author's view, the security concern accordingly does not satisfy the standards set out in the 1995 *Johannesburg Principles on National Security, Freedom of Expression and Access to Information.*[4]

3.4 The author also claims he has been subjected to arbitrary detention, contrary to article 9 of the Covenant. Since his detention in June 1993, he was only eligible for a detention review 120 days after issuance of his deportation order in August 1998. By that point, he had spent five years in detention without access to bail, detention review or habeas corpus (the latter unavailable to non-citizens in respect of detention relating to a person's status in Canada). He points out that his detention under the Immigration Act was mandatory, as well as arbitrary in that while the Federal Court described his detention as "unfortunate", it did not regard it an infringement of his liberty. He regards this as an example of discriminatory treatment of non-citizens. He also argues that it is perverse and therefore arbitrary to continue a person's detention while s/he is exercising a basic human right, that is, access to court.

3.5 The author argues that expulsion would expose him to torture, in breach of article 7 of the Covenant. He refers to the Committee's general comments 15 on aliens and 20 on article 7, as well as the decision of *Chahal v. United Kingdom*[5] of the European Court of Human Rights, for the proposition that the principle of non-refoulement admits of no exceptions. He contends that the State party is thus in error in respect of both its alleged claims that (i) he is not at risk of torture, and (ii) even if he were, he may be expelled on the grounds of threat to national security.

3.6 For the proposition that he is, in fact, at risk of torture, the author refers to a variety of reports and evidence generally regarding the human rights situation in Iran, including arbitrary detention, torture and extrajudicial and summary murder of political dissidents.[6] He contends that in his case, the senior Canadian intelligence officer who testified believed that he was afraid of what might happen to him in Iran and that he had defected. In addition, his refugee status had been recognized after a full hearing. He contends that his case has a high public profile and that he was not aware that he could seek a closed hearing. The details of the cooperation and (confidential) information he provided to the State party's authorities, as well as his resistance to deportation, could "very likely" constitute treason in Iran, which has been monitoring his case. On either the State party's or his own account of his past relationship with the MIS, therefore, there "could not be a clearer case" of a person who could expect torture in Iran.

3.7 On the same basis, the author fears that his removal will result in his execution in Iran, breaching his rights under article 6. The author also makes a corollary claim under article 7 that his detention since June 1993 in a cell in a short-term detention facility with no programmes or gainful occupation is itself cruel.

The State party's submissions on the admissibility and merits of the communication

4.1 By submissions on 12 July 2002, the State party contested the admissibility and the merits of the communication, arguing that, for the reasons described below, the claims are all inadmissible as not having made out a prima facie claim and thus inadmissible, as well as being unfounded on the merits. In addition, certain elements of the communication are also said to be inadmissible for failure to exhaust domestic remedies.

4.2 As to the alleged violation of article 2, the State party refers to the Committee's jurisprudence that article 2 confers an accessory, rather than a freestanding, right, which arises only after another violation of the Covenant has been established. Accordingly, no prima facie violation is established. Alternatively, there has been no violation - the State party's constitutional *Charter of Rights and Freedoms* protects Covenant rights, and the domestic courts found no *Charter* violation. As to the contention that *Charter* rights are not equally enjoyed between citizens and non-citizens, the State party argues that most rights, including the right to life, liberty and security of the person, apply to all persons in Canada. As to freedom of expression and association, the Supreme Court held in *Suresh* that these rights do not include persons who, to use the State party's words, "are or have been associated with things directed at violence". This finding applies equally to Canadians as well as to non-Canadians.

4.3 Concerning the alleged violations of articles 6 and 7 in the event of a return to Iran, the State party argues that the facts, as determined by its courts, do not support these allegations. In addition, the author is not credible, in the light of his inconsistent accounts of his involvement with the MIS, the implausibility of important aspects of his story, and repeated, proven dishonesty. In addition, current human rights abuses are directed against regime opponents in Iran, rather than persons with the author's profile.

4.4 As to the allegations of risk, the State party points out that the Minister's staff assessed any risk of harm as "minimal", a finding upheld by all federal courts up to the Supreme Court, which regarded it as "unassailable". In addition, the courts clearly determined as fact that the author was not credible, based inter alia on inconsistent, contradicted, embellished and repeatedly untruthful statements. They also relied upon his recognition that he had received specialized training upon recruitment into the secret service, his disclosure of the details of assassination of two dissidents and his contact with the secret service, after receipt of refugee status, including meeting a "known assassin" in Europe. The State party refers to the Committee's approach that it is not generally its function to weigh evidence or reassess findings of fact such as these made by the domestic courts, and requests, should the Committee decide to review the factual conclusions, the opportunity of making further submissions.

4.5 Neither, in the State party's view, are the author's allegations of risk supported by independent evidence. The State party observes that the documents cited by the author refer primarily to arrest and trials of reformists, dissidents and other government opponents, rather than persons of the author's profile, members current or former of the MIS. Indeed, the most recent human rights report of the United States Department of State indicates that the MIS personnel are prominent agents, rather than targets, of persecution, committing "numerous serious human rights abuses".[7] While the human rights situation remains problematic, the State party, relying on reports of Amnesty International[8] and the United Nations Special Representative of the Commission on Human Rights on the human rights situation in Iran, identifies signs of progress towards reduced use of torture.[9] Nor, for its part, has the case law of the Committee against Torture characterized the human rights situation in Iran as "a consistent pattern of gross, flagrant or mass violations of human rights". Thus the general human rights situation is not, per se, of the type or severity to support the allegations.

4.6 The State party regards the contention that he would be summarily executed for treasonous conduct in the event of a return as merely speculative and self-serving. The author has not established such an action to be the "necessary and foreseeable" consequence of deportation. The author had full opportunity to establish this at all levels of the Canadian courts, and failed to do so. Alternatively, even if he was regarded as treasonous, he has not shown that he would fail to receive a trial and punishment consistent with the Covenant. Similarly, with respect to torture, the courts found that only a minimal risk of harm existed. The State party emphasizes that the author was recognized to be a refugee before he voluntarily travelled to Europe with a commander of the MIS and came to the attention of the Canadian security service. It adds that if the author's identity as a trained operative had earlier been known, he would not have been admitted to the country. It also rejects that any awareness that Iran has of the case must imply torture, as well as any substantiation of the claim that the senior Canadian intelligence officer believed he defected. Nor has he provided any evidence of mistreatment of family, or shown why alleged cooperation with the Canadian authorities would of itself give rise to torture. As a result, these claims are unsubstantiated on even a prima facie basis.

4.7 As to the alleged violation of article 7 through conditions of detention, the State party argues the author did not file a *Charter* claim raising this issue before the courts, despite being advised of complaints possibilities, and thus the claim is inadmissible for lack of exhaustion of domestic remedies. In any case, the absence of activities during treatment cannot be considered cruel, and the author has not shown that his conditions of detention caused any adverse physical or mental effects.

4.8 On the issue of arbitrary detention, the author could have appealed to the Federal Court of Appeal's confirmation of his detention under section 40 (1) (8) of the Act to the Supreme Court but did not do so. Nor did he file any subsequent motion for release under the section. As a result, the claims are inadmissible for non-exhaustion of domestic remedies.

4.9 In any event, there is no prima facie violation of article 9 as the detention was not arbitrary. Guidance may be drawn from article 5 of the European Convention for the Protection of Human Rights and Fundamental Freedoms ("European Convention"), which explicitly permits detention with a view to deportation. Indeed, in the *Chahal* case cited by the author, the European Court considered that such detention is justified as long as deportation proceedings are in progress and being pursued with due diligence. Chahal's detention on the basis that successive Secretaries of State had maintained he was a threat to national security was not arbitrary, in view of the process available to review the national security elements. Neither is it arbitrary, argues the State party, for it to detain a non-Canadian individual under a procedure where two Ministers determine, pursuant to law, that an individual has a terrorist background or propensities. This determination is then expeditiously reviewed in court. Of 22 cases where this process has been followed, 11 cases were reviewed in 1 to 2 months, 3 cases in 3 to 4 months, 4 cases in 6 to 13 months and 1 case is ongoing.

4.10 The State party refers to the Committee's jurisprudence that an individual's insistence not to leave a State's territory is relevant to the article 9 assessment.[10] Similarly, the European Commission has held that an individual cannot complain of passage of time if at no stage he requested expeditious termination of proceedings and pursued any litigation avenue he could find.[11] The author did not ask the Minister of Citizenship and Immigration to exercise his power under section 40 (1) (7) of the Act to release, for purposes of departure, a person named in a security certificate.

4.11 The State party argues it has exercised due diligence in pursuing the deportation proceedings, and that the author is responsible for the length of time they have taken. All of the delay prior to section 40 (1) "reasonableness" hearing on the security certificate was due to the author's request for adjournment to challenge the constitutionality of the procedure. He let this challenge lapse for long periods without taking steps within his control necessary to advance the process. In fact, the State party details numerous steps it took in this period seeking to advance the procedure expeditiously. Similarly, after issue of the removal order, the additional delay of the removal was caused by the author's exercise of numerous remedies available to him. The State party details the steps it took to expedite the procedures described in the chronology of the case, noting that the author took no such steps of expedition.

4.12 Concerning the author's contention that habeas corpus is not available to non-citizens in respect of detention regarding immigration status, the State party submits that as continued detention depends on the outcome of the Federal Court's "reasonableness" hearing on the security certificate, there is no need for a separate hearing on detention. In other words, the mandatory "reasonableness" hearing is a statutory detention review, within the power of Parliament to prescribe for such purposes. The Canadian courts have also held this procedure an adequate and effective alternative remedy to habeas corpus. Accordingly, the State party rejects the author's contention that its courts found that his detention was "unfortunate" but not a loss of liberty: the courts in fact held that while the certification has the immediate effect of leading to arrest and detention, a fate normally reserved to criminals, there was no violation of articles 7 and 9 of the *Charter*, both of which protect liberty interests.[12]

4.13 In term of the claim under article 13 of the Covenant, the State party argues, firstly, that, according to the Committee's jurisprudence, this provision requires that an alien is expelled according to the procedures laid down by law, unless the State had acted in bad faith or abused its power.[13] The author has not argued, much less established, any such exception here, and thus it would be appropriate for the Committee to defer to the Canadian authorities' assessment of the facts and law. Secondly, the State party pleads national security grounds in connection with the procedures followed. In its jurisprudence, the Committee has held that "it is not for the Committee to test a sovereign State's evaluation of an alien's security rating"[14] and that it would defer to such an assessment in the absence of arbitrariness.[15] The State party invites the Committee to apply the same principles, emphasizing that the decision of expulsion was not summary but followed careful deliberation through full and fair procedures in which the author was legally represented and submitted extensive arguments.

4.14 Concerning the process of the Federal Court's "reasonableness" hearing on the security certificate, while constitutional issues could not be raised at that hearing, which is an expedited one, they can be the subject of a separate constitutional challenge, as the author himself pursued to the level of the Supreme Court. The State party observes that the judge has a "heavy burden" of ensuring that the author is reasonably informed by way of summary of the case against him, and he can present a case in reply and call witnesses; indeed, the author himself cross-examined two Canadian security service officers.

4.15 As to the process of the Minister's risk determination, the State party points out that the Supreme Court has indicated in *Suresh* the minimum requirements of fairness, including that reasons be given, applicable when a prima facie case of torture has been made out. As to the objection that the decision is made by a Minister previously involved in the process, the State party points out that the courts hold, through judicial review, the decision to law. While deferring to the Minister's weighing of evidence unless patently unreasonable, the courts insist that all relevant, and no irrelevant, factors are considered. The State party argues that as the procedures were fair, in accordance with law, and properly applied with the author having access to courts with legal representation and without any other factors of bias, bad faith or impropriety being present, the author has not established a prima facie violation of article 13.

4.16 As to the article 14 claims, the State party finds this provision inapplicable as deportation proceedings are neither the determination of a criminal charge nor a rights and obligations in a "suit at law". They are rather public law proceedings, whose fairness is guaranteed in article 13. In *Y.L. v. Canada*,[16] the Committee, given the existence of judicial review, did not decide whether proceedings before a Pension Review Board came within a "suit at law", while in *V.M.R..B.*,[17] the Committee did not decide whether deportation proceedings could be so characterized as in any event the claim was unsubstantiated. The State party submits that given the equivalence of article 6 of the European Convention with article 14, the Committee should find persuasive the strong and consistent jurisprudence that such proceedings fall outside the scope of this article. It follows that this claim is inadmissible *ratione materiae*.

4.17 In any event, the proceedings satisfied article 14 guarantees: the author had access to the courts, knew the case he had to meet, had a full opportunity to make his views known and to make submission throughout the proceedings and was legally represented at all stages. The State party also refers the Committee to its decision in *V.M.R.B.*, where it found the certification process under section 40 (1) of the Immigration Act consistent with article 14. There is thus no prima facie violation of the right claimed.

4.18 By note of 6 December 2002, the State party, while reiterating its view of the limited scope of the Committee's function to re-evaluate factual and evidentiary determinations, supplied extensive additional information on these issues in the event the Committee wished to do so. The State party submitted that a fair assessment of the information provided inevitably lead to the same conclusions reached by the domestic courts: that the author was a trained operative of the MIS, that he was at minimal risk of harm in Iran, and that his evidence was neither credible nor trustworthy.

Further issues arising in relation to the Committee's request for interim measures

5.1 By letter of 2 August 2002 to the State party's representative to the United Nations in Geneva, the Committee, through its Chairperson, expressed great regret at the author's deportation, in contravention of its request for interim protection. The Committee sought a written explanation about the reasons which led to disregard of the Committee's request for interim measures and an explanation of how it intended to secure compliance with such requests in the future. By note of 5 August 2002, the Committee, acting through its Special Rapporteur on new communications, pursuant to rule 86 of the Committee's rules of procedure, requested the State party to monitor closely the situation and treatment of the author subsequent to his deportation to Iran and to make such representations to the Government of the Islamic Republic of Iran that were deemed pertinent in order to prevent violations of the author's rights under articles 6 and 7 of the Covenant.

5.2 By submissions dated 5 December 2002, the State party, in response to the Committee's request for explanation, argued that it fully supported the important role mandated to the Committee and would always do its utmost to cooperate with the Committee. It contended that it took its obligations under the Covenant and the Optional Protocol very seriously and that it was in full compliance with them. The State party points out that alongside its human rights obligations it also has a duty to protect the safety of the Canadian public and to ensure that it does not become a safe haven for terrorists.

5.3 The State party noted that neither the Covenant nor the Optional Protocol provide for interim measures requests and argues that such requests are recommendatory, rather than binding. Nonetheless, the State party usually responded favourably to such requests. As in other cases, the State party considered the instant request seriously, before concluding in the circumstances of the case, including the finding (upheld by the courts) that he faced a minimum risk of harm in the event of return, that it was unable to delay the deportation. The State party pointed out that usually it responds favourably to requests and its decision to do so was determined to be legal and consistent with the *Charter* up to the highest judicial level. The State party argues that interim measures in the immigration context raise "some particular difficulties" where, on occasion, other considerations may take precedence over a request for interim measures. The particular circumstances of the case should thus not be construed as a diminution of the State party's commitment to human rights or the Committee.

5.4 As to the Committee's request to monitor the author's treatment in Iran, the State party argued that it had no jurisdiction over the author and was being asked to monitor the situation of a national of another State party on that State party's territory. However, in a good faith desire to cooperate with the Committee, the State party stated that on 2 October 2002 the Iranian authorities had advised that the author remained in Iran and was well. In addition, on 26 September 2002, the State party was contacted by a representative of the Iranian Embassy, advising that the author had called to inquire about three pieces of luggage he had left at the detention centre. The Embassy had agreed to convey the luggage back to the author. In the State party's view, this showed that the author does not fear the Iranian Government, which is willing to assist him. Finally, on 10 October 2002, the author visited the State party's Embassy in Iran, met with two employees and handed over a letter. Neither the conversation nor the letter raised ill-treatment issues, rather, he had difficulty obtaining employment. In the State party's view, this showed he was able to move about Tehran at will. The State party stated it had indicated to Iran that it expected it to comply fully with its international human rights obligations, including as owed to the author.

Comments of the author's counsel

6.1 By letter of 10 September 2003, counsel for the author responded to the State party's submissions. Procedurally, counsel observed that she had received instructions from the author prior to removal that she should continue the communication if he encountered difficulties, but that she should desist pursuit of the case if the author experienced no difficulties after his return to Iran, in order not to place him at increased risk. On the basis of a telephone call one month after deportation, counsel believed that the author had been arrested upon arrival, but not mistreated, and released. A journalistic source subsequently rumoured that he had been detained or killed. Upon repeated attempts to call the family, counsel was told he was at another location and/or that he was sick. Canadian officials had indicated several contacts from the author in fall 2002, but they had reported nothing since. Similarly, Amnesty International had been unable to confirm further details. In this light, counsel assumed the author had come to harm and thus pursued the communication.

6.2 As to the substance, counsel does not wish to pursue the claim on conditions of detention, in light of an admitted failure to exhaust domestic remedies. As to the remaining issues, she develops her argument in respect of the process followed by the State party's authorities. The initial security certification was made by two elected officials (Ministers) without any input from the author, as to whether it was "reasonable" to believe that he was a member of a terrorist organization or himself so engaged. The sole Federal Court hearing thereafter only determined whether that belief was itself reasonable. The Crown evidence was led in camera and ex parte, without being tested by the court or supported by witnesses. Counsel thus argues that the conclusion of a national security threat, which was subsequently balanced at the removal stage by one elected official (a Minister) against the risk of harm, was reached by an unfair process. The decision to remove, in turn, was reviewed by the courts only for patent unreasonableness, rather than correctness.

6.3 Counsel responds to the State party's arguments on the author's credibility by referring to UNHCR practice to the effect that a lack of credibility does not of itself negate a well-founded fear of persecution.[18] Counsel notes that his initial application refugee claim was accepted despite variations in his account as to his past, and further that the Canadian security agencies destroyed their evidence, including interviews with the author and polygraph records, and provided only summaries. This evidence could have been tested as is the case before the Security Intelligence Review Committee, where an independent counsel, cleared on security grounds, could call witnesses and cross-examine in secret hearing.

6.4 Counsel proceeds to attack the decision of the Supreme Court handed down in the author's case subsequent to submission of the communication. Counsel observes that Mr. Suresh, whose appeal was upheld on the basis of insufficient procedural protections, and the author, whose appeal was rejected, both underwent the same process. The basis of the Court's decision in the author's case was that he had not made out a prima facie risk of torture, however, the entire premise of a fair process is that an accurate determination of precisely this question can be made. Instead, all the author received was a post-decision judicial review on whether it was "reasonable" to so conclude, which, in counsel's view, is an inappropriately low standard for a decision that could result in torture or loss of life. Counsel also recalls that the Court in *Suresh* envisaged some extraordinary situations where a person could be returned where a substantial risk of torture had been made out, contrary to the absolute ban on torture in international law.

6.5 On the issue of the author's credibility, counsel points out that the senior Canadian security officer corroborated at the security certificate hearing the author's claim that he had defected - the only dispute with the author was whether that was to avoid joining or after first joining the MIS. Either way, his defection makes him an opponent, real or perceived, of the Iranian regime, and this was the way press coverage described him. An Iranian consular official visited him in detention prior to removal, and the Iranian Government was fully aware of his claims and the nature of his case. In any event, counsel considers the reliance on credibility disingenuous, where much of the material for this conclusion was based on untested evidence led in camera and ex parte. Counsel also argues it is inaccurate to describe the author as an agent of the regime and thus not a target of abuses, as being a defector and providing security intelligence to Canada, he will more likely than not be regarded as a regime opponent. If, as is suggested, the author was simply a "discovered" undercover agent, he would not have resisted removal, in detention, for nine years. In addition, an alleged move to restrict torture in Iran must be seen against the recent admitted torture and killing of a Canadian national in that country. It is more likely that opponents will be tortured and executed, rather than be given a fair trial, which the State party provides no evidence of. Nor, according to counsel, did the State party monitor the author's return to Iran.

6.6 On the issue of the risk of torture or other forms of cruel treatment, counsel observes that the Supreme Court found "unassailable" the conclusion that the author only faced a minimal risk in the context of paying "considerable deference" to the Minister's decision, who considered issues "largely outside the realm of the reviewing courts". As to the actual risk involved, counsel points out that it is impossible to "prove" what would be likely to happen to him, but rather the author has made reasonable inferences from the known facts, including the Iranian Government's interest in the case, the human rights violations in Iran against perceived regime opponents, the public knowledge of his cooperation with Canadian officials in releasing classified information, and so on.

6.7 On the issues of arbitrary detention and expulsion process within articles 9, 13 and 14, counsel argues that the author was detained for five years, under mandatory and automatic terms, before his detention review. Under the Act's regime, security certification results in automatic detention of non-citizens until the proceedings are completed, a person is ordered deported and then remains in Canada for a further 120 days. No judge made a decision to detain him, and habeas corpus was unavailable to him as a non-citizen detained under immigration legislation, while his constitutional challenge to the certification process was dismissed. Counsel points out that it was open to the State party to use other removal processes that would not have had these effects. She observes that the State party's practice belies its assertion that detention is necessary on national security grounds, as not all alleged terrorists are in fact detained. Counsel emphasizes that in *V.M.R.B.*,[19] detention was, in contrast to the present regime, not automatic or mandatory, and weekly detention reviews existed. Rather, counsel refers to *Torres v. Finland* and *A. v. Australia* for the proposition that non-citizens have the right to challenge, in substantive terms, the legality of detention before a court promptly and de novo, and then with reasonable intervals.[20] She observes that the European Convention, under which the *Chahal* decision referred to by the State party was adopted, specifically provides for detention for immigration purposes.

6.8 Counsel observes, with respect to the author's application under section 40 (1) (8) of the Act for release after passage of 120 days from the deportation order, that release may be ordered if the person will not be removed within a reasonable time and the release would not be injurious to national security or others' safety. The Federal Court found that the onus was on the author to show these two criteria were satisfied, however counsel points out that both the trial court and the appellate court considered he could be removed within a reasonable time were it not for his own repeated recourse to the courts, and that thus he could not satisfy this branch of the necessary requirements. The appellate court also found that as the author had been detained for security reasons, and thus would normally have to show "some significant change in circumstances or new evidence not previously available" in order to be released under the detention review mechanism - in counsel's view, this plainly does not satisfy the requirement under the Covenant for a de novo review of detention.

6.9 Counsel rejects the State party's argument that the security certificate "reasonableness" hearing in Federal Court was a sufficient detention review, arguing that this hearing concerned only the reasonableness of the certificate rather than the justification for detention. In addition, if this hearing was a detention review, there would be no need for a further detention review 120 days after a deportation order. In response to the argument that the prolonged detention was caused by the author himself, counsel responds that even if the security certificate "reasonableness" hearing had been heard without interruption, it would have been months before it was completed, a deportation inquiry undertaken and 120 days passed so as to allow a detention review under section 40 (1) (8). Counsel observes that other cases less complicated than the author's have resulted in detention reviews only becoming available well after a year. Finally, counsel observes that the State party never assisted the author in finding another country to which he could depart. He had no other alternative to detention as he had no other country to which he could travel.

Supplementary submission by the State party

7.1 By submission of 15 October 2003, the State party argues that the material advanced by counsel as to events subsequent to expulsion is insufficient basis for a conclusion that the author was in fact detained, disappeared, tortured or otherwise treated contrary to article 7, much less for a conclusion that a real risk thereof existed at the time of expulsion. The State party emphasizes that counsel acknowledges that he was not mistreated upon arrival, and that the reporter's rumour that he "was detained or killed" dated prior to his presentation to the State party's Embassy in Tehran. The State party adds that in the week 6 to 10 October 2003, a representative of the State party in Tehran spoke with the author's mother, who indicated that he was alive and well, though receiving regular medical treatment for an ulcer. According to the State party, the author's mother had said that he was currently unemployed and leading a pretty normal existence. No details of the possible confidentiality and other arrangements of the discussion are given. The State party submits that it did not violate the author's rights under the Covenant in expelling him to Iran.[21]

7.2 The State party also disputes the reliance placed upon the decisions of the Committee and other international bodies. With respect to the *Ferrer-Mazorra* decision of the Inter-American Commission of Human Rights that Cuban nationals who Cuba refused to accept could not be indefinitely detained, the State party points out that in the present case there was no automatic and indeterminate presumption of detention. Rather than being detained on a "mere assumption", he was detained upon the dual Ministers' security certification that he was a threat to the safety and security of the Canadian public. In addition, in contrast to the Cuban case, there had been a decision to remove him, and his detention was appropriate and justified for that purpose.

7.3 With respect to the onus being found by the Federal Court to lie on the author to justify his release under section 40 (1) (8) application, the State party observes that the Minister had already satisfied the onus to justify arrest, and thus the lengthy proceedings that had been undertaken would have to be repeated if onus to justify continued detention lay with the Minister. It is thus not arbitrary, having shown that there are reasonable grounds to believe an alien is a member of a terrorist group, for the onus to lie with that person to justify release. As to the court review of detention required by the Committee in *A. v. Australia*, the State party submits that the Federal Court's "reasonableness" hearing, providing real rather than formal review, satisfies this purpose. The length of these proceedings, during which he was detained, was reasonable in the circumstances, as delay was mainly due to the author's own decisions, including his resistance to leaving the State party. The State party continues that the Committee, in assessing the presumptive detention not individually justified at issue in *A. v. Australia*, distinguished the *V.M.R.B.* case, which case is more analogous one to the present case. In *V.M.R.B.*, as presently, an individual Ministerial assessment led to arrest of the individual in question. That detention was reasonable and necessary to deal with a person posing a risk to national security, and did not continue beyond the period for which justification could be provided.

The State party's failure to respect the Committee's request for interim measures of protection

8.1 The Committee finds, in the circumstances of the case, that the State party breached its obligations under the Optional Protocol, by deporting the author before the Committee could address the author's allegation of irreparable harm to his Covenant rights. The Committee observes that torture is, alongside the imposition of the death penalty, the most grave and irreparable of possible consequences to an individual of measures taken by the State party. Accordingly, action by the State party giving rise to a risk of such harm, as indicated a priori by the Committee's request for interim measures, must be scrutinized in the strictest light.

8.2 Interim measures pursuant to rule 86 of the Committee's rules adopted in conformity with article 39 of the Covenant, are essential to the Committee's role under the Protocol. Flouting of the rule, especially by irreversible measures such as the execution of the alleged victim or his/her deportation from a State party to face torture or death in another country, undermines the protection of Covenant rights through the Optional Protocol.

Issues and proceedings before the Committee

Consideration of admissibility

9.1 Before considering any claims contained in a communication, the Human Rights Committee must, in accordance with article 87 of its rules of procedure, decide whether or not it is admissible under the Optional Protocol to the Covenant.

9.2 The Committee notes, with respect to the claim of arbitrary detention contrary to article 9, the State party's contention that the claim is inadmissible for failure to exhaust domestic remedies in the form of an appeal to the Supreme Court with respect to his application for release under section 40 (1) (8) of the Act. The Committee observes that, by law, the author's ability to apply for release under this section only arose in August 1998 following expiry of 120 days from the issuance of the deportation order was made, that point being a total of five years and two months from initial detention in the author's case. In the absence of any argument by the State party as to domestic remedies which may have been available to the author prior to August 1998, the Committee considers that the author's claim under article 9 prior to August 1998 until that time is not inadmissible for failure to exhaust domestic remedies. The author's failure to pursue to the Supreme Court his application for release under section 40 (1) (8) however does render inadmissible, for failure to exhaust domestic remedies, his claims under article 9 related to detention after that point. These latter claims are accordingly inadmissible under article 5, paragraph 2 (b), of the Optional Protocol.

9.3 The Committee notes that counsel for the author has withdrawn the claims relating to conditions of detention on the grounds of non-exhaustion of domestic remedies, and thus does not further address this issue.

9.4 The Committee observes that the State party argues that the remaining claims are inadmissible, for, in the light of substantial argumentation going to the merits of the relevant facts and law, the claims are either insufficiently substantiated, for purposes of admissibility, and/or outside the Covenant *ratione materiae*. In such circumstances, the Committee considers that the claims are most appropriately dealt with at the merits stage of the communication.

Consideration of the merits

10.1 The Human Rights Committee has considered the present communication in the light of all the information made available to it by the parties, as provided in article 5, paragraph 1 of the Optional Protocol.

10.2 As to the claims under article 9 concerning arbitrary detention and lack of access to court, the Committee notes the author's argument that his detention pursuant to the security certificate as well as his continued detention until deportation was in violation of this article. The Committee observes that, while the author was mandatorily taken into detention upon issuance of the security certificate, under the State party's law the Federal Court is to promptly, that is within a week, examine the certificate and its evidentiary foundation in order to determine its "reasonableness". In the event that the certificate is determined not to be reasonable, the person named in the certificate is released. The Committee observes, consistent with its earlier jurisprudence, that detention on the basis of a security certification by two Ministers on national security grounds does not result ipso facto in arbitrary detention, contrary to article 9, paragraph 1. However, given that an individual detained under a security certificate has neither been convicted of any crime nor sentenced to a term of imprisonment, an individual must have appropriate access, in terms of article 9, paragraph 4, to judicial review of the detention, that is to say, review of the substantive justification of detention, as well as sufficiently frequent review.

10.3 As to the alleged violation of article 9, paragraph 4, the Committee is prepared to accept that a "reasonableness" hearing in Federal Court promptly after the commencement of mandatory detention on the basis of a Ministers' security certificate is, in principle, sufficient judicial review of the justification for detention to satisfy the requirements of article 9, paragraph 4, of the Covenant. The Committee observes, however, that when judicial proceedings that include the determination of the lawfulness of detention become prolonged the issue arises whether the judicial decision is made "without delay" as required by the provision, unless the State party sees to it that interim judicial authorization is sought separately for the detention. In the author's case, no such separate authorization existed although his mandatory detention until the resolution of the "reasonableness" hearing lasted 4 years and 10 months.

Although a substantial part of that delay can be attributed to the author who chose to contest the constitutionality of the security certification procedure instead of proceeding directly to the "reasonableness" hearing before the Federal Court, the latter procedure included hearings and lasted nine and half months after the final resolution of the constitutional issue on 3 July 1997. This delay alone is in the Committee's view too long in respect of the Covenant requirement of judicial determination of the lawfulness of detention without delay. Consequently, there has been a violation of the author's rights under article 9, paragraph 4, of the Covenant.

10.4 As to the author's later detention, after the issuance of a deportation order in August 1998, for a period of 120 days before becoming eligible to apply for release, the Committee is of the view that such a period of detention in the author's case was sufficiently proximate to a judicial decision of the Federal Court to be considered authorized by a court and therefore not in violation of article 9, paragraph 4.

10.5 As to the claims under articles 6, 7, 13 and 14, with respect to the process and the fact of the author's expulsion, the Committee observes, at the initial stage of the process, that at the Federal Court's "reasonableness" hearing on the security certification the author was provided by the Court with a summary redacted for security concerns reasonably informing him of the claims made against him. The Committee notes that the Federal Court was conscious of the "heavy burden" upon it to assure through this process the author's ability appropriately to be aware of and respond to the case made against him, and the author was able to, and did, present his own case and cross-examine witnesses. In the circumstances of national security involved, the Committee is not persuaded that this process was unfair to the author. Nor, recalling its limited role in the assessment of facts and evidence, does the Committee discern on the record any elements of bad faith, abuse of power or other arbitrariness which would vitiate the Federal Court's assessment of the reasonableness of the certificate asserting the author's involvement in a terrorist organization. The Committee also observes that the Covenant does not, as of right, provide for a right of appeal beyond criminal cases to all determinations made by a court. Accordingly, the Committee need not determine whether the initial arrest and certification proceedings in question fell within the scope of articles 13 (as a decision pursuant to which an alien lawfully present is expelled) or 14 (as a determination of rights and obligations in a suit at law), as in any event the author has not made out a violation of the requirements of those articles in the manner the Federal Court's "reasonableness" hearing was conducted.

10.6 Concerning the author's claims under the same articles with respect to the subsequent decision of the Minister of Citizenship and Immigration that he could be deported, the Committee notes that the Supreme Court held, in the companion case of *Suresh*, that the process of the Minister's determination in that case of whether the affected individual was at risk of substantial harm and should be expelled on national security grounds was faulty for unfairness, as he had not been provided with the full materials on which the Minister based his or her decision and an opportunity to comment in writing thereon and further as the Minister's decision was not reasoned. The Committee further observes that where one of the highest values protected by the Covenant, namely the right to be free from torture, is at stake, the closest scrutiny should be applied to the fairness of the procedure applied to determine whether an individual is at a substantial risk of torture. The Committee emphasizes that this risk was highlighted in this case by the Committee's request for interim measures of protection.

10.7 In the Committee's view, the failure of the State party to provide him, in these circumstances, with the procedural protections deemed necessary in the case of *Suresh*, on the basis that the present author had not made out a prima facie risk of harm fails to meet the requisite standard of fairness. The Committee observes in this regard that such a denial of these protections on the basis claimed is circuitous in that the author may have been able to make out the necessary level of risk if in fact he had been allowed to submit reasons on the risk of torture faced by him in the event of removal, being able to base himself on the material of the case presented by the administrative authorities against him in order to contest a decision that included the reasons for the Minister's decision that he could be removed. The Committee emphasizes that, as with the right to life, the right to be free from torture requires not only that the State party not only refrain from torture but take steps of due diligence to avoid a threat to an individual of torture from third parties.

10.8 The Committee observes further that article 13 is in principle applicable to the Minister's decision on risk of harm, being a decision leading to expulsion. Given that the domestic procedure allowed the author to provide (limited) reasons against his expulsion and to receive a degree of review of his case, it would be inappropriate for the Committee to accept that, in the proceedings before it, "compelling reasons of national security" existed to exempt the State party from its obligation under that article to provide the procedural protections in question. In the Committee's view, the failure of the State party to provide him with the procedural protections afforded to the plaintiff in *Suresh* on the basis that he had not made out a risk of harm did not satisfy the obligation in article 13 to allow the author to submit reasons against his removal in the light of the administrative authorities' case against him and to have such complete submissions reviewed by a competent authority, entailing a possibility to comment on the material presented to that authority. The Committee thus finds a violation of article 13 of the Covenant, in conjunction with article 7.

10.9 The Committee notes that as article 13 speaks directly to the situation in the present case and incorporates notions of due process also reflected in article 14 of the Covenant, it would be inappropriate in terms of the scheme of the Covenant to apply the broader and general provisions of article 14 directly.

10.10 As a result of its finding that the process leading to the author's expulsion was deficient, the Committee thus does not need to decide the extent of the risk of torture prior to his deportation or whether the author suffered torture or other ill-treatment subsequent to his return. The Committee does however refer, in conclusion, to the Supreme Court's holding in *Suresh* that deportation of an individual where a substantial risk of torture had been found to exist was not necessarily precluded in all circumstances. While it has neither been determined by the State party's domestic courts or by the Committee that a substantial risk of torture did exist in the author's case, the Committee expresses no further view on this issue other than to note that the prohibition on torture, including as expressed in article 7 of the Covenant, is an absolute one that is not subject to countervailing considerations.

11. The Human Rights Committee, acting under article 5, paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights, is of the view that the facts as found by the Committee reveal violations by Canada of article 9, paragraph 4, and article 13, in conjunction with article 7, of the Covenant. The Committee reiterates its conclusion that the State party breached its obligations under the Optional Protocol by deporting the author before the Committee's determination of his claim.

12. In accordance with article 2. paragraph 3 (a), of the Covenant, the State party is under an obligation to provide the author with an effective remedy, including compensation. In the light of the circumstances of the case, the State party, having failed to determine appropriately whether a substantial risk of torture existed such as to foreclose the author's deportation, is under an obligation (a) to make reparation to the author if it comes to light that torture was in fact suffered subsequent to deportation, and (b) to take such steps as may be appropriate to ensure that the author is not, in the future, subjected to torture as a result of the events of his presence in, and removal from, the State party. The State party is also under an obligation to avoid similar violations in the future, including by taking appropriate steps to ensure that the Committee's requests for interim measures of protection will be respected.

13. Bearing in mind that, by becoming a party to the Optional Protocol, the State party has recognized the competence of the Committee to determine whether there has been a violation of the Covenant or not and that, pursuant to article 2 of the Covenant, the State party has undertaken to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the Covenant, and to provide an effective and enforceable remedy in case a violation has been established, the Committee wishes to receive from the State party, within 90 days, information about the measures taken to give effect to the Committee's Views. The State party is also requested to publish the Committee's Views.

[Adopted in English, French and Spanish, the English text being the original version. Subsequently to be issued also in Arabic, Chinese and Russian as part of the present report.]

Notes

[1] Section 53 (1) (b) reads, in relevant part: "… [N]o person who is determined … to be a Convention refugee … shall be removed from Canada to a country where the person's life or freedom would be threatened for reasons of race, religion, nationality, membership in a particular social group or political opinion unless

…

> (b) the person is a member of an inadmissible class described in paragraph 19 (1) (e), (f), (g), (j), (k) or (l) and the Minister is of the opinion that the person constitutes a danger to the security of Canada".

[2] Section 40 (1) provides, in material part:

> "(8) Where a person is detained under subsection (7) and is not removed from Canada within 120 days of after the making of a removal order relating to that person, the person may apply to the [Federal Court].

(9) On [such] an application, the [Federal Court] may, subject to such terms and conditions as the [Federal Court] deems appropriate, order that the person be released from detention if the [Federal Court] is satisfied that:

(a) The person will not be removed from Canada within a reasonable time; and

(b) The person's release would not be injurious to national security or the safety of persons."

[3] [2002] 1 SCR.

[4] UN Doc. E/CN.4/1996/39 (annex).

[5] (1996) 23 E.H.R.R. 413.

[6] The author refers to "Iran: Trial of Political Activists Begins - Basic Rights Violated in Secret Detentions", Human Rights Watch, 8 January 2002; "Iran: Journalists at Risk", Human Rights Watch, 22 December 2001; "Iran: Release Detainees from Iran Freedom Movement", Human Rights Watch, 10 November 2001; "Iran: Human Rights Developments" in *World Report 2001* and *World Report 1998*, Human Rights Watch; "Iran: A Legal System that Fails to Protect Freedom of Expression & Association", Amnesty International, December 2001; "Iran: Halt the Surge of Executions", Amnesty International, 17 August 2001; "Iran: The Revolutionary Court Must End Arbitrary Arrests", Amnesty International, 11 April 2001; "Iran: Time for Judicial Reform and End to Secret Trials", Amnesty International, 16 September 1999; "Iran: Country Reports on Human Rights Practices for 2000", United States Department of State, 23 February 2001; "Iran: Country Reports on Human Rights Practices for 1997", United States Department of State, 30 January 1998; "Iran" in *Annual Report for 1997*, Amnesty International; "U.N. Urges Halt to Public Executions", *New York Times*, 23 April 1998; "U.N. Rebukes Iran Over Human Rights Violations", *Toronto Star*, 19 April 1998.

[7] "Iran: Country Reports on Human Rights Practices for 2001", United States Department of State.

[8] "Iran: Time for Judicial Reform and End to Secret Trials", op. cit.

[9] A/56/278, 10 August 2001.

[10] *V.M.R.B. v. Canada*, case No. 236/1987, decision adopted on 26 July 1988.

[11] *Osman v. United Kingdom*, *Khan v. United Kingdom* and *Kolompar v. Belgium*.

[12] Article 7 of the *Charter* provides: "Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice", while article 9 provides: "Everyone has the right not to be arbitrarily detained or imprisoned."

[13] *Maroufidou v. Sweden*, case No. 58/1979, Views adopted on 9 April 1981.

[14] *V.M.R.B. v. Canada*, op. cit., and *J. R. B. v. Costa Rica*, case No. 296/1988, decision adopted on 30 March 1989.

[15] *Stewart v. Canada*, case No. 538/1993, decision adopted on 18 March 1994.

[16] Case No. 112/1981, decision adopted on 8 April 1986.

[17] Op. cit.

[18] *Handbook on Procedures and Criteria for Determining Refugee Status*, Office of the United Nations High Commissioner for Refugees, at para. 198 et seq.

[19] Op. cit.

[20] Case No. 291/1998, Views adopted on 5 April 1990 and case No. 560/1993, Views adopted on 30 April 1997. Counsel also cites, to similar effect, *Ferrer-Mazorra v. United States*, Inter-American Commission of Human Rights, report No. 51/01 of 4 April 2001.

[21] The State party also provided an article, dated 13 September 2003, and entitled "Deported Iranian admits he lied", from the *National Post* newspaper. In light of the State party's express statement that it "does not rely on [the article]", the Committee does not refer to this article further.

APPENDIX

Individual opinion of Committee member Mr. Nisuke Ando

I am unable to share the Committee's conclusion that the facts in the present case reveals violations by the State party of article 9, paragraph 4, as well as article 13 in conjunction with article 7.

With respect to article 13 of the Covenant, the Committee states "[i]t would be inappropriate for the Committee to accept that, in the proceedings before it, 'compelling reasons of national security' existed to exempt the State party from its obligation under that article to provide the procedural protections in question." (10.7). In the Committee's view, the author should have been provided with the same procedural protections as those provided to *Suresh*, another Iranian in a similar situation. However, the reason why the author has not been provided with the same procedural protections is that, while *Suresh* successfully made out a prima facie case for risk of torture upon his return to Iran, the author failed to establish such a case. Considering that the establishment of such a case is the precondition for the procedural protection, the Committee's conclusion that the author should have been provided the same procedural protection is tantamount to the argument that the cart should be put before the horse, which is logically untenable in my opinion.

With respect to article 9, paragraph 4, the Committee admits that a substantial part of the delay of the proceedings in the present case is attributable to the author who chose to contest the constitutionality of the security certification instead of proceeding to the "reasonableness" hearing before the Federal Court. And yet, the Committee concludes that the reasonableness hearing itself lasted nine and a half months and such a long period does not meet the requirement of article 9, paragraph 4, that the court may decide the lawfulness of detention "without delay". (10.3). Nevertheless, the process of the Federal Court's reasonableness hearing imposed a heavy burden on the judge to ensure that the author would be reasonably informed of the cases against him so that he could prepare himself for reply and call witnesses if necessary. Furthermore, considering that the present case concerned expulsion of an alien due to "compelling reasons of national security" and that the court had to assess various facts and evidence, the period of nine and a half months does not seem to be unreasonably prolonged. It might be added that the Committee fails to clarify why it is inappropriate for the Committee to accept that "compelling reasons of national security" existed for the State party in the present case (10.7), since the existence of those reasons primarily depends on the judgement of the State party concerned unless the judgement is manifestly arbitrary or unfounded, which is not the case in my opinion.

(*Signed*): Nisuke Ando

[Adopted in English, French and Spanish, the English text being the original version. Subsequently to be issued also in Arabic, Chinese and Russian as part of the present report.]

Individual opinion of Committee member Ms. Christine Chanet

I share the standing position of the Committee that the issue of an administrative detention order on national security grounds does not result ipso facto in arbitrary detention.

Nevertheless, if such detention is not to be regarded as arbitrary, it must be in conformity with the other requirements of article 9 of the Covenant, failing which the State commits a violation of the first sentence of article 9, paragraph 1, by failing to guarantee the right of everyone to liberty and security of person.

Article 9 is not the only provision of the Covenant which, in my view, should be given such an interpretation.

For example, the execution of a pregnant woman, a flagrant breach of article 6, paragraph 5, constitutes a violation of the right to life as set forth in article 6, paragraph 1.

The same applies in the case of a person who is executed without having been able to exercise the right to seek pardon, in breach of article 6, paragraph 4, of the Covenant.

This reasoning is also applicable to the articles in the Covenant which begin in the first paragraph by setting forth a principle and, in the body of the article, identify the means required to guarantee the right (art. 10); these means take the form either of positive steps that the State must take, such as ensuring access to a judge, or of prohibitions, as in article 6, paragraph 5.

Consequently, when a female prisoner has not had prompt access to a judge, as required by article 9, paragraph 4 of the Covenant, there has been a failure to comply with the first sentence of article 9, paragraph 1.

(*Signed*): Christine Chanet

[Adopted in English, French and Spanish, the French text being the original version. Subsequently to be issued also in Arabic, Chinese and Russian as part of the present report.]

Individual opinion of Committee members Sir Nigel Rodley, Mr. Roman Wieruszewski, Mr. Ivan Shearer (dissenting)

We do not agree with the Committee's finding of a violation of article 9, paragraph 4. The Committee seems to accept, albeit in language implying some uncertainty, that the first four years of the author's detention did not involve a violation of article 9, paragraph 4, since it was the author's choice not to avail himself of the "reasonableness" hearing procedure pending the constitutional challenge (paragraph 10.4 above). The Committee accepts that the "reasonableness" hearing meets the requirements of article 9, paragraph 4. Accordingly, its finding of a violation is based on the narrow ground that the "reasonableness" hearing lasted nine and a half months and that of itself involved a violation of the right to a judicial determination of the lawfulness of the detention without delay. It offers no explanation of why that period violated the provision. Nor is there anything on the record it could have relied on. There is no evidence that the proceedings were unduly prolonged or, if they were, which party bears the responsibility. In the absence of such information or any other explanation of the Committee's reasoning, we cannot join in its conclusion.

(*Signed*): Nigel Rodley

(*Signed*): Roman Wieruszewski

(*Signed*): Ivan Shearer

[Adopted in English, French and Spanish, the English text being the original version. Subsequently to be issued also in Arabic, Chinese and Russian as part of the present report.]

CC. Communication No. 1060/2002, *Deisl v. Austria* (Views adopted on 27 July 2004, eighty-first session)*

Submitted by:	Franz and Maria Deisl (represented by counsel, Mr. Alexander Morawa)
Alleged victim:	The authors
State party:	Austria
Date of communication:	17 September 2001 (initial submission)

The Human Rights Committee, established under article 28 of the International Covenant on Civil and Political Rights,

Meeting on 27 July 2004,

Having concluded its consideration of communication No. 1060/2002, submitted to the Human Rights Committee on behalf of Franz and Maria Deisl under the Optional Protocol to the International Covenant on Civil and Political Rights,

Having taken into account all written information made available to it by the author of the communication, and the State party,

Adopts the following:

Views under article 5, paragraph 4, of the Optional Protocol

1. The authors of the communication are Franz Deisl and his wife, Maria Deisl, Austrian citizens, born on 10 July 1920 and 21 January 1932. They claim to be victims of a violation by Austria[1] of articles 14, paragraph 1, and 26 of the Covenant. They are represented by counsel.

The facts as submitted by the authors

2.1 By virtue of contracts dated 20 February and 19 October 1966, the authors bought a plot of land located in the Municipality of Elsbethen near the City of Salzburg from one Mr. F.H. On 15 February 1967, the authors were formally registered as owners of the plot.

2.2 On 20 November 1966, and without the authors' knowledge, F.H. applied for an exception from the zoning regulations in order to change the designation of the plot from "rural" to "residential". The Elsbethen Municipal Council approved his request, on 13 April 1967, and forwarded the decision to grant the exception to the Salzburg Provincial Government for formal approval. On 31 May 1967, the Salzburg Provincial Government refused to grant an exception from the zoning regulations, again without the authors' knowledge.

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* The following members of the Committee participated in the examination of the present communication: Mr. Abdelfattah Amor, Mr. Nisuke Ando, Mr. Prafullachandra Natwarlal Bhagwati, Ms. Christine Chanet, Mr. Franco Depasquale, Mr. Maurice Glèlè Ahanhanzo, Mr. Walter Kälin, Mr. Ahmed Tawfik Khalil, Mr. Rafael Rivas Posada, Sir Nigel Rodley, Mr. Martin Scheinin, Mr. Ivan Shearer, Mr. Hipólito Solari Yrigoyen, Ms. Ruth Wedgwood, Mr. Roman Wieruszewski and Mr. Maxwell Yalden.

2.3 Also in the spring of 1967, the authors bought an old granary, after the mayor of Elsbethen had orally informed them that he would not object to their plan to rebuild the granary on their property. However, on 12 August 1969, the Municipality of Elsbethen issued a decision ordering the authors to stop converting the granary into a weekend house. By letter of 12 September 1969, the Municipality advised the authors to apply for an exception from the zoning regulations prohibiting construction on their plot of land, pursuant to section 19, paragraph 3, of the Salzburg Provincial Zoning Law.

2.4 The Elsbethen Municipal Council granted the authors' application for an exception on 30 September 1969, and, on 3 October 1969, confirmed its decision in writing. On 8 October 1969, the Municipality submitted the decision for approval to the Salzburg Provincial Government, which, on 17 October 1969, denied the exception as *res iudicata*, stating that the application for an exception by the former owners of the plot had already been denied. The authors were not informed of that decision until February 1982.

2.5 In the spring of 1974, the authors acquired and reconstructed another granary on their property for use as a shed. On 17 July 1974, the mayor ordered them to demolish the building used as a shed. The authors' appeal of 30 July 1974 against that decision was not examined until May 1987.

2.6 Meanwhile, the mayor of Elsbethen had ordered the authors to discontinue "construction of a further weekend house" on 21 August 1973, and on 23 April 1974, to demolish "a dwelling" on their plot of land by 31 July 1974. On 7 May 1974, the authors appealed this decision to the Elsbethen Municipal Council, which set the decision aside on 9 June 1974, stating that it merely identified a "dwelling", without clarifying which of the two buildings on the authors' plot was to be demolished. The decision could therefore not be complied with for lack of precision.

2.7 On 1 February 1982, the Elsbethen Municipal Council dismissed the authors' application for an exception from the zoning regulations, endorsing the Provincial Government's argument that the application had to be rejected as *res iudicata*. The authors appealed that decision to the Provincial Government, arguing that the former owners had applied for the exception, without the authors' authorization or knowledge, after having sold the plot of land to the authors. On 10 August 1982, the Salzburg Provincial Government quashed the decision of the Municipal Council because of its failure to deal with the merits of the application. The Provincial Government also considered that the Council's decision of 1 February 1982 was the first formal decision on the authors' application, dated 18 September 1969, for an exception from the zoning regulations.

2.8 Thereafter, the Municipality of Elsbethen initiated formal proceedings to determine whether an exception from the zoning regulations should be granted. On 7 May 1985, it issued another decision denying the exception, noting that the authors' weekend house would affect the existing rural structure of the area, after the authors had been given opportunity to comment on two one-page expert opinions on the matter. The authors appealed that decision on 9 July 1985.

2.9 Meanwhile, construction of a family home had started about 70 meters from the author's plot of land, on the basis of an exception from the zoning regulations and a building permit granted by the Municipality of Elsbethen in 1977.

2.10 On 20 December 1985, the authors applied for a retroactive exception from the zoning regulations under a new "amnesty law", enabling owners of unlawfully constructed dwellings in the Province of Salzburg to apply for special retroactive permits. By letter of 4 April 1986 to the Governor of Salzburg, the mayor of Elsbethen indicated his willingness to grant an exception from the zoning regulations as well as a building permit for the first granary, while the second granary on the authors' property should be removed. At the same time, he recalled that the Municipality had granted two exceptions permitting the construction of family homes in the immediate vicinity of the authors' plot, which had been approved by the Provincial Government.

2.11 By letter of 12 June 1986, an assistant of the Governor informed the authors of a proposed settlement, whereby the authors would withdraw their appeal against the denial of an exception from the zoning regulations, while the Municipality would set aside its decision denying such an exception, issue a favourable decision, and submit this decision to the Provincial Government for approval. The authors, accordingly, withdrew their appeal on 4 July 1986; the Municipality, in turn, set aside its decision of 7 May 1985 and submitted a decision dated 21 May 1986, by which the Municipal Council had granted an exception under the "Amnesty Law", to the Provincial Government.

2.12 On 13 January 1987, the Provincial Government informed the authors that their application for an exception from the zoning regulations had to be rejected as *res iudicata*. The Municipality of Elsbethen endorsed this finding on 4 February 1987. The authors appealed that decision on 18 February 1987.

2.13 On 6 February 1987, the mayor of Elsbethen ordered the authors to demolish the granary and the shed by 31 December 1987. The authors appealed that decision on 17 February 1987. On 6 May 1987, the Municipality set aside the mayor's demolition order, as the authors' appeal against the demolition order of 17 July 1974 in respect of the shed was still pending. With two decisions relating to the same matter, the second demolition order had to be set aside, until a decision on the appeal against the first demolition order was taken. On 11 May 1987, the Municipal Council dismissed the authors' appeal against the 1974 demolition order and directed the authors to remove the shed by 31 December 1987. This deadline was extended several times.

2.14 On 13 November 1989, the Salzburg Provincial Government set aside the Municipality's decision of 4 February 1987 denying an exception from the zoning regulations, because the Municipality had not addressed the merits of the authors' application. The Provincial Government ordered the Municipality to initiate proceedings to determine whether an exception should be granted and to give the authors access to the file of the proceedings, from 1966 onwards.

2.15 On 25 March 1991, the Municipality of Elsbethen again rejected the authors' request for an exception, after giving them an opportunity to comment on the opinion of an expert on zoning issues. On 3 June 1991, the Provincial Government, on appeal by the authors, set aside the Municipality's decision, finding that the expert opinion merely contained general statements. It directed the Municipality to seek another expert opinion to determine whether the authors' buildings contravened local zoning regulations, which was completed on 15 January 1993.

2.16 On 22 February 1993, the Municipality again denied an exception from the zoning regulations. On 4 October 1993, the Provincial Government dismissed the authors' appeal against that decision, based on the new Provincial Zoning Law (1992), which no longer provided for exceptions from the zoning regulations.

2.17 By decision of 29 November 1994, the Constitutional Court refused to examine the authors' complaint, dated 16 November 1993, against the Provincial Government's decision of 4 October 1993 and referred the matter to the Administrative Court. On 12 October 1995, the Administrative Court set the decision aside, holding that applications for exceptions from zoning regulations had to be assessed not on the basis of the 1992 Zoning Law, but of the regulations in force at the material time.

2.18 Meanwhile, on 12 February 1994, the Municipality of Elsbethen had ordered the authors to demolish their weekend house by 30 September 1994. The Provincial Government dismissed the authors' appeal against this decision on 4 December 1995, and on 5 January 1996, affirmed its earlier decision to deny an exception from the zoning regulations. The authors' complaints of 15 January 1996 against these decisions, in which they alleged violations of their rights to a decision by a competent tribunal, equality before the law, and inviolability of their property, were rejected by the Constitutional Court on 29 September 1998. The matter was referred to the Administrative Court, which rejected the complaints on 3 November 1999.

2.19 On 25 September 2001, after the Regional Administrative Authority for the District of *Salzburg Umgebung* had rejected their request for an extension of the deadline for settling the modalities of the demolition of their buildings, the authors submitted an application to the European Court of Human Rights, alleging a breach of their right to property (article 1 of the first Additional Protocol to the European Convention). At the same time, they applied for interim measures to prevent the imminent demolition of their buildings. On 26 September 2001, the European Court registered the authors' application but rejected their request for interim measures, and on 29 January 2002, it declared the application inadmissible, as it had been lodged more than six months after the date of the final domestic decision, i.e. the decision of the Administrative Court of 3 November 1999.[2]

The complaint

3.1 The authors allege violations of their rights under articles 14, paragraph 1, and 26 of the Covenant, as the proceedings were neither "fair" nor "public" nor concluded expeditiously, but were conducted by authorities which consistently and deliberately acted to the detriment of their procedural position and discriminated against them. By reference to the jurisprudence of the European Court of Human Rights, they claim that article 14, paragraph 1, is applicable to the proceedings concerning their request for an exception from the zoning regulations, as well as their appeals against the demolition orders, since these proceedings determined their rights and obligations in a suit at law.

3.2 The authors claim that their right to equality before the courts under article 14, paragraph 1, had been violated through the misapplication of laws, failure to decide on their petitions and appeals, and the mishandling of their file at all stages of the proceedings. Thus, they were never informed of the former owner's application for an exception from the zoning regulations, or its rejection, despite the fact that the authorities knew about the pending transfer of ownership. The Provincial Government's disapproval of the authors' own request for an exception, dated 18 September 1969, was not communicated to them until February 1982. Similarly, their appeal against the mayor's demolition order of 17 July 1974 was not dealt with for 13 years and then suddenly decided against the authors in May 1987. For some 20 years, the authorities failed to examine the substance of the authors' application, repeatedly rejecting it as *res iudicata*. When a decision on the merits was finally taken in 1991, the Municipality again failed to address the relevant issues and merely relied on generalities. The Provincial Government, in its decision of 4 October 1993, even found a new law applicable to the authors' case.

3.3 The authors submit that none of the authorities or administrative courts conducted a public hearing, as required by article 14, paragraph 1. Their right to a fair trial before an independent and impartial tribunal was violated, because the authorities demonstrated by their conduct that they would decide against the authors, irrespective of the facts put before them.[3]

3.4 The authors claim a violation of their right to an expeditious procedure, an integral element of the right to a fair hearing guaranteed by article 14, paragraph 1,[4] as the proceedings relating to their application for an exception took more than 30 years, despite the simplicity of the matter, which required only little factual research and legal analysis. Given that this duration was prima facie unreasonable, the burden was on the State party to prove that its organs were not responsible for the delays. While the authors exercised due diligence throughout the proceedings and submitted all required information within short deadlines, the authorities kept them uninformed about the status of the proceedings for some 15 years (1967 until 1982), failed to take a single decision that survived even the most rudimentary scrutiny on appeal for 24 years (1969 until 1993) and twice failed to take any decision at all for approximately 13 years. Even the Administrative and Constitutional Courts remained inactive for considerable periods of time before setting aside a decision of the Provincial Government in October 1995 (after 11 months) or dismissing the authors' constitutional complaints in November 1994 (after one year) and in September 1998 (after two years and nine months). The authors consider that the fact that they consistently appealed against obviously flawed decisions cannot be held against them.

3.5 The authors claim that the rejection of their application from the zoning regulations, combined with the authorities' failure to take a decision on the merits for decades, or to deal with their appeals, the procedural flaws of their decisions, and the ex post facto application of the 1992 Provincial Zoning Law, amounted to arbitrariness and discriminated against them, in violation of article 26 of the Covenant, in comparison to their neighbour, Mr. X., who obtained an exception from the zoning regulations and a building permit in 1977, for the construction of a family home located some 70 meters from the authors' own plot of land.

3.6 The authors submit documentary evidence (pictures, sketches) to show that, by contrast to the two neighbouring family homes, which are made of wood and brick with oversize modern roofs and are visible from miles away, since they stand on a meadow in an elevated position without any treeline hiding them, their granary and shed are well shielded by a treeline and cannot be seen unless one steps on their plot of land. From a hiking trail passing by the authors' property, hikers can only see a small part of the granary, an antique building dating from 1757, which has been restored and is an all-wooden construction typical of the Province of Salzburg. Therefore, neither the granary nor the shed defeat the purpose of the zoning regulations not to have residential structures erected in rural areas to preserve the natural beauty of the landscape.

Although the neighbouring buildings were equally located on plots zoned "rural", the Municipality of Elsbethen, with the explicit approval of the Salzburg Provincial Government, granted their owners an exception from the zoning regulations.

3.7 The authors submit that their application to the European Court of Human Rights did not relate to the same matter, as it exclusively alleged a violation of their right to property, which is not as such protected under the Covenant.

The State party's observations on admissibility

4.1 On 28 May 2002, the State party challenged the admissibility of the communication, by reference to article 5, paragraph 2 (a), of the Optional Protocol and, insofar as the events complained of had occurred before the entry into force of the Optional Protocol for Austria on 10 March 1988, also *ratione temporis*.

4.2 The State party submits that the same matter is being examined by the European Court of Human Rights. The fact that, in their application to the European Court, the authors only claim a violation of their right to property, as guaranteed in article 1 of the First Additional Protocol to the European Convention on Human Rights, does not preclude the Court from ex officio also examining violations of articles 6 (right to a fair trial) and 14 (prohibition of discrimination) of the European Convention. Since the European Court could therefore examine the facts in a manner consistent with the fair trial and equal treatment principles enshrined in articles 14 and 26 of the Covenant, the authors' application to the European Court relates to the same substantive rights as the communication registered before the Committee.

4.3 By reference to the Committee's jurisprudence,[5] the State party argues that the communication is inadmissible *ratione temporis*, insofar as it relates to decisions and delays that occurred prior to the entry into force of the Optional Protocol for the State party on 10 March 1988. This particularly concerns the alleged difference in treatment between the authors and Mr. X., whose request for an exemption from the zoning regulations was granted in 1977, and the State party's alleged failure to decide within a reasonable time frame on the authors' request of 18 September 1969 for an exception from the zoning regulations (denied on 1 February 1982) as well as on their appeal dated 30 July 1974 against the mayor's demolition order of 17 July 1974 (dismissed on 11 May 1987).

Author's additional submissions and comments on the State party's observations on admissibility

5.1 On 12 June 2002, the authors requested the Committee to issue a request for interim measures, under rule 86 of its rules of procedure, asking the State party to suspend proceedings to enforce the demolition order. They informed the Committee that, on 23 May 2002, the Regional Administrative Authority for the District of *Salzburg Umgebung* had rejected their petition to suspend the enforcement proceedings until the Committee's final decision, at the same time ordering them to transfer a down payment of €4,447.67 by 1 August 2002 for implementing the demolition order, and that an appeal against that decision had no suspensive effect.

5.2 The authors argue that the enforcement of the demolition order would cause them irreparable damage, since the destruction of the irreplaceable antique granaries, which they had restored, maintained and furnished over the past 30 years, cannot be compensated by money and would give rise to further breaches of their rights under articles 7 and 17 of the Covenant. By letter of 9 September 2002, the Committee informed the authors that no interim measures would be granted in their case.

5.3 On 18 September 2002, the authors noted that the matter was no longer being examined by the European Court, after the Court had declared their application inadmissible for non-compliance with the six-month rule on 29 January 2002. Given the purely formal nature of the six-month rule, the Court was precluded from examining the substance of the application.[6] The Austrian reservation to article 5, paragraph 2 (a), of the Optional Protocol was consequently inapplicable, as the same matter had never been examined by the European Court, within the meaning of that provision.

5.4 The authors reject the State party's contention that their communication is inadmissible *ratione temporis*. At least the decisions which finally determined their legal position and constituted a violation of their Covenant rights, in particular the decisions of the Constitutional and Administrative Courts, were taken after the entry into force of the Optional Protocol for Austria.[7] Moreover, the Committee had repeatedly asserted its competence to consider alleged violations of the Covenant which, despite having their origin prior to the entry into force of the Optional Protocol, either continue or have effects which themselves constitute violations after that date. This was particularly true for cases where a certain status of the authors affecting their rights is confirmed by administrative and judicial decisions after the date of entry into force.[8] Moreover, the Committee was competent to determine whether violations of the Covenant occur after the date of entry into force as a consequence of acts or omissions related to the continued application of laws or decisions affecting the rights of the authors.[9]

The State party's additional submissions on admissibility and observations on merits

6.1 On 18 September 2002, the State party further commented on the admissibility and, subsidiarily, on the merits. It reiterates that the communication is inadmissible *ratione temporis*, insofar as it relates to events that occurred before 10 March 1988. Insofar as the authors complain about a violation of article 14 of the Covenant, the communication must be rejected *ratione materiae*, since the authors never had a "right" to establish a building on their plot of land, which could have been determined in a suit at law, given that such construction was clearly not allowed under the zoning regulations. Consequently, the proceedings for removing the illegally erected buildings must equally fall outside the scope of article 14. Otherwise, the circumvention through illegal building activities of the proceedings for granting an exemption would lead to an improvement of their legal position.

6.2 Regarding the duration of the proceedings, the State party submits that the authors did not exhaust domestic remedies, as they could have alleged a procedural delay by filing a request for transfer of competence (*Devolutionsantrag*), enabling individuals to bring a case before the competent higher authority if no decision is taken within six months, or by lodging a complaint about the administration's failure to take a decision within due time (*Säumnisbeschwerde*) with the Administrative Court, to speed up the proceedings. According to the European Court of Human Rights, such complaints constituted "effective remedies" in cases where an undue delay of the proceedings is alleged.[10] Moreover, the authors' failure to expedite proceedings by challenging the inactivity of the authorities seemed to indicate that a postponement of the final removal order was in their interest.

6.3 The State party also challenges the authors' status of "victims" on the basis that they had established two buildings on their plot of land, despite their being fully aware that any construction on green land required an exemption from the zoning regulations. It was not until they had been ordered to stop the construction of the first granary that they applied for an exemption. Since more expeditious proceedings would only have led to earlier sanctions for their illegal conduct, the authors had not been placed at any disadvantage as a result of the duration of the proceedings.

6.4 Insofar as the authors claim that none of the authorities were properly constituted tribunals within the meaning of article 14, paragraph 1, of the Covenant, and that no public hearing was conducted in their case, the State party invokes its reservation to article 14 of the Covenant, which had the objective of maintaining "the Austrian organization of administrative authorities under the judicial control of the Administrative Court and the Constitutional Court". These claims also lacked sufficient substantiation in the light of the European Court's jurisprudence that: (a) The right to a fair trial does not oblige States parties to have a decision on civil rights issued by tribunals at all stages of the proceedings;[11] (b) the Administrative Court is a tribunal within the meaning of article 6 of the European Convention;[12] and (c) the absence of an oral hearing does not violate the right to a fair trial, if complainants do not avail themselves of the possibility to request a hearing (section 39 of the Austrian Administrative Court Act), thereby waiving their right to an oral hearing.[13]

6.5 Concerning the authors' allegations that their right to a fair hearing and to equality before the courts had been violated, the State party refers to the Committee's jurisprudence that it is generally for the courts of States parties to evaluate facts in a particular case and to interpret domestic legislation, unless such evaluation or interpretation was manifestly arbitrary or amounted to a denial of justice. Since the alleged deficiencies in the proceedings, in any event, fell short of manifest arbitrariness or denial of justice, this part of the communication was inadmissible for lack of substantiation. The same was true of the authors' claim that the competent authorities were not impartial, for which no reasons had been given.

6.6 Subsidiarily and on the merits, the State party submits that the length of proceedings was justified by the complexity of the matter, the proper conduct of the authorities as well as the authors' own conduct. Thus, proceedings with an impact on regional planning were frequently highly complex because of the numerous interests at stake, e.g. the need to protect the environment, to ensure that the population density is in line with an area's economic and ecological capacity, to create the basic prerequisites for sustainable development of the economy, infrastructure and housing, and to secure a viable agriculture and forestry. While the authorities complied with their duty to conduct several rounds of proceedings in order to determine the authors' requests and appeals, the authors themselves failed to meet their procedural responsibility to combat delays with all procedural means,[14] such as the above request for transfer of competence or complaint about the administration's inactivity.

6.7 As to the allegedly excessive delays in the proceedings before the Administrative Court and the Constitutional Court, the State party argues that the authors would have been free to seize both courts simultaneously rather than successively in order to avoid a loss of time.

Moreover, between 1994 and 1996, the Constitutional Court had to give priority to consideration of some 5,000 cases in the field of alien law, which had mainly resulted from the crisis in the Balkans. In 1996 and 1997, the Court was faced with mass proceedings comprising more than 11,000 complaints about the minimum corporate tax. The temporary backlog resulting from the sudden increase in the Court's workload could not be attributed to the State party, considering that prompt remedial action had been taken, with pending cases being prioritized on the basis of importance.[15]

6.8 The State party submits that the authors' situation could not be compared to that of their neighbours, who had applied for a permit prior to establishing buildings on their plot of land. Moreover, these buildings were permanent homes rather than weekend homes, constructed in the vicinity of existing farms. Owing to the spatial connection with the existing farm buildings, these constructions were less exposed than the authors' weekend home, which lacked any connection with existing settlements.

6.9 The authors' claim under article 26 of the Covenant would be unfounded, even if the situations were comparable, in the absence of a right to "equality in injustice". According to the Constitutional Court's jurisprudence, the legality of an authority's decision cannot be challenged on the basis of that authority's failure to sanction similar misconduct in comparable cases. Otherwise, any law would invariably be inapplicable, and the principle of the rule of law jeopardized, whenever a decision that is favourable to the applicant but contrary to the law were to be issued by an authority. This could not have been the intention of the equality principle in article 26 of the Covenant.

6.10 Lastly, the State party submits that the "amnesty regulations for illegal buildings" referred to by the authors were merely a statement of intent by the Salzburg Regional Government designed to remedy defects in the zoning regulations and providing for a review of individual cases in order to establish: (a) whether a building was constructed in good faith; (b) whether a building was constructed at a time when no zoning regulations existed; or (c) whether a building was constructed with the intention of circumventing existing legal provisions. Given the lack of good faith of the authors, who had knowingly erected their buildings in contravention of the existing zoning regulations, the refusal retroactively to grant them a permit could not be considered an arbitrary act in violation of article 26. Furthermore, the 30-year long existence of these buildings could not lead to the "prescription" of an unlawful condition.

Authors' comments on the State party's observations on admissibility and merits

7.1 By submission of 24 July 2003, the authors object to the State party's contention that they had erected the buildings unlawfully, thereby circumventing the proceedings for granting a permit. Rather, they had merely moved an antique granary from a neighbouring plot to their own land, after having sought the consent of the mayor of Elsbethen, which had given rise to their expectation that they could lawfully erect the building. From a formalistic point of view, this was entirely lawful at that time, given that an exception from the zoning regulations had initially been granted to the former owner of their property, albeit unknown to them.

7.2 The authors reaffirm that the communication is admissible *ratione temporis* and, moreover, *ratione materiae*, because article 14, paragraph 1, of the Covenant lacks the qualifying word "civil", therefore covering a wider scope than article 6, paragraph 1, of the

European Convention. Since their case concerns the question of whether an existing building could be maintained or would have to be torn down, it directly affects "rights" within the meaning of article 14, paragraph 1. The State party's argument that a permit to build on the authors' land, by means of an exception from the zoning regulations, was "clearly not allowed", was inconsistent with the fact that the Elsbethen Municipal Council had granted exactly such an exception to the former owners of the plot, presumably because it considered that this exception was lawful. Taking into account that it took the administrative authorities and courts more than 35 years to reach a final conclusion, it could hardly be claimed that there was any degree of clarity in this respect.

7.3 Regarding domestic remedies, the authors submit that they were not required actively to pursue, or even accelerate, a set of proceedings that could result in a legal consequence detrimental to their interests and property rights,[16] such as the demolition of their buildings.

7.4 The authors reaffirm that they are victims of a violation of article 14, paragraph 1, which seeks to protect the right to have one's case determined in a reasonable period of time; prolonged proceedings placed those affected in the situation and formal status of victims, in particular if they lasted for no less than 35 years.

7.5 The authors argue that the length of the proceedings was not attributable to their own conduct. In the absence of any obligation to actively pursue the case, they were merely required to, and indeed did, comply with the procedural norms, respond to official queries and file appeals with due diligence. By contrast, the State party had failed to ensure that the proceedings initiated by its authorities were completed in compliance with article 14, paragraph 1.

7.6 The authors recall that, out of their allegations concerning the numerous delays in the proceedings, the State party had merely challenged those related to proceedings before the Constitutional and Administrative Courts. They reject the State party's attempt to justify these delays by the alleged complexity of the case, which was neither supported by the case file, containing documents and decisions produced in the course of 35 years which barely filled one folder, nor by the little effort required for the assessment of the facts and the law, the scarce evidence taken or the marginal involvement of experts. Similarly, the State party had failed to substantiate that the increased workload of the Constitutional Court allegedly caused by mass proceedings in asylum and minimum corporate tax cases impaired the Court in such a way as to justify the substantial delays complained of.

7.7 In support of their claim under article 26, the authors submit that the State party falsely stated: (a) that the houses constructed by the authors' neighbours are permanent homes; (b) that these homes had been built for the farmers' children; and (c) that the neighbouring buildings are not as exposed as the authors' granary, despite the detailed documentary evidence proving that the opposite is true. While the granary, a traditional structure which had been located in the immediate vicinity since the eighteenth century, was virtually invisible unless one entered the authors' property, the other buildings were large and imposing homes which could be seen from far away.

7.8 In response to the State party's argument that no "equality in injustice" exists, the authors argue that article 26 governs any official conduct regulated by law, be it positive or negative for the individual.

Additional observations by the State party and authors' comments

8.1 On 22 October 2003, the State party reiterated its arguments made in May 2002. In particular, it emphasizes that the authors had never obtained a permit under the Regional Planning Act, as the decision issued by the Municipal Council on 13 April 1967 had not been approved by the supervisory authority in its decision of 31 May 1967. An oral consent by the mayor could not replace the required permit under the Provincial Zoning Law.

8.2 The State party submits that it was irrelevant for the requirement of exhaustion of domestic remedies whether proceedings are directed against an author. Thus, the European Court of Human Rights considered that even an accused in criminal proceedings must make use of legal remedies to expedite proceedings in order to exhaust domestic remedies in cases where a violation of the right to have one's case determined without undue delay is alleged.[17] In any event, this right had not been violated in the present case, taking into account the authors' counterproductive conduct, i.e. their request to suspend the proceedings during a four-month absence in 1987.

8.3 The State party reiterates that it follows from the far-reaching similarity between articles 6, paragraph 1, of the European Convention and article 14, paragraph 1, of the Covenant that the latter is inapplicable to the authors' case. Moreover, the authors were never entitled to construct a building on their plot of land. In the absence of such a right, the present proceedings did not relate to the "determination of rights" within the meaning of article 14 of the Covenant.

8.4 The State party maintains that the workload of the Constitutional Court rose tremendously between 1994 and 1996, with more than 5,000 cases relating to foreigners alone and 11,122 complaints against notices requiring prepayment of corporate taxes.

9.1 On 8 December 2003, the authors reply that their request to postpone the Provincial Government's decision on their appeal against the Municipality's denial of 4 February 1987 to grant the requested exception from the zoning regulations for *res iudicata* only showed their determination to fully participate in the proceedings. Although they had returned from their vacation in November 1987, it took the Provincial Government until 13 November 1989 to take a decision on their appeal.

9.2 Regarding the length of proceedings, the authors consider it appropriate to follow the traditional approach of the European Court of Human Rights[18] of not requiring individuals to actively cooperate with the prosecuting authorities. Even if the Committee were to prefer the Court's recent jurisprudence, requiring applicants to avail themselves of legal remedies to complain about the excessive length of proceedings also in criminal cases, this requirement had so far only been applied by the European Court to cases with a single set of proceedings within which a remedy to accelerate the same existed but was not used by the applicants.[19] The present communication had to be distinguished from these cases in that it involved numerous administrative and judicial review proceedings.

9.3 Moreover, the authors submit that the effectiveness of such remedies depends on whether they had a significant impact on the length of proceedings as a whole and whether they were available throughout the proceedings. However, from 8 October 1969 to 1 February 1982, remedies to accelerate proceedings were unavailable to the authors, simply because they did not know that proceedings concerning the approval of the exception granted by the Municipality were pending before the Provincial Government. Subsequently, negotiations on a friendly settlement had resulted in an agreement in 1986, which was unilaterally terminated by the Provincial Government's withdrawal of its approval.

9.4 The authors submit that no remedy to accelerate proceedings exists before the Constitutional and Administrative Courts. The part of the communication relating to the delays before these courts, totalling five years and nine months, was therefore admissible in any event.[20]

9.5 The authors reiterate that the increase in the Constitutional Court's workload was not substantial, since all 11,000 complaints relating to the minimum corporate tax had been removed from the Court's docket with one single judgement of 22 pages. While the sorting, registering and storing of the thousands of petitions had surely constituted a burden for the Court's registry, it had in no way affected the adjudicative processes.

9.6 Lastly, the authors submit that the European Court's case law was unequivocal in declaring article 6, paragraph 1, of the European Convention applicable to proceedings concerning building permits and demolition orders.[21]

Issues and proceedings before the Committee

Consideration of admissibility

10.1 Before considering any claim contained in a communication, the Human Rights Committee must, in accordance with rule 87 of its rules of procedure, decide whether or not the communication is admissible under the Optional Protocol to the Covenant.

10.2 Irrespective of whether the State party has invoked its reservation to article 5, paragraph 2 (a), of the Optional Protocol or not, the Committee recalls that when the European Court has based a declaration of inadmissibility solely on procedural grounds, rather than on reasons that include a certain consideration of the merits of the case, then the same matter has not been "examined" within the meaning of the Austrian reservation to article 5, paragraph 2 (a), of the Optional Protocol.[22] The Committee notes that the European Court declared the authors' application inadmissible for failure to comply with the six-month rule (article 35, paragraph 4, of the European Convention), and that no such procedural requirement exists under the Optional Protocol. In the absence of an "examination" of the same matter by the European Court, the Committee concludes that it is not precluded from considering the authors' communication by virtue of the Austrian reservation to article 5, paragraph 2 (a), of the Optional Protocol.

10.3 The Committee takes note of the State party's objection that the communication is inadmissible *ratione temporis*, insofar as it relates to events which occurred prior to the entry into force of the Optional Protocol for Austria on 10 March 1988. It recalls that it cannot consider alleged violations of the Covenant which occurred before the entry into force of the Optional Protocol for the State party, unless these violations continue after that date or continue to have effects which in themselves constitute a violation of the Covenant.[23] It notes that the 13-year delay in informing the authors about the Provincial Government's decision of 17 October 1969, which disapproved the Municipality's decision to grant their application for an exemption from the zoning regulations, as well as in deciding on the authors' appeal of 30 July 1974 against the mayor's demolition order of 17 July 1974, both predate the entry into force of the Optional Protocol for the State party. The Committee does not consider that these alleged violations continued to have effects after 10 March 1988, which would in themselves have constituted violations of the authors' Covenant rights. The communication is therefore inadmissible *ratione temporis* under article 1 of the Optional Protocol, insofar as it relates to the above-mentioned delays.

10.4 As to the State party's argument that the allegedly discriminatory treatment of the authors also pre-dated the entry into force of the Optional Protocol for Austria, the Committee notes that, while it is true that an exemption from the zoning regulations and a building permit had been granted to Mr. X. as early as 1977, the authors' request for similar permits was ultimately rejected by the Provincial Government on 5 January 1996, and their appeal against that decision dismissed by the Administrative Court on 3 November 1999.

10.5 However, the Committee considers that the authors have failed to substantiate, for purposes of admissibility, that their allegedly discriminatory treatment was based on one of the grounds enumerated in article 26. Similarly, they have not substantiated, for purposes of admissibility, that the reasons advanced by the Provincial Government and the Administrative Court for rejecting their request for an exemption from the zoning regulations were arbitrary. The Committee concludes that this part of the communication is inadmissible under article 2 of the Optional Protocol.

10.6 Regarding the authors' claim that the absence of any oral hearing throughout the proceedings violated their right to a fair and public hearing under article 14, paragraph 1, of the Covenant, the Committee has noted the State party's argument that the authors could have requested an oral hearing before the Administrative Court and that, by failing to do so, they had waived their right to such a hearing. It also notes that the authors have not refuted this argument in substance and that they were represented by counsel throughout the proceedings before the Administrative Court. The Committee therefore considers that the authors have failed to substantiate, for purposes of admissibility, that their right to a fair and public hearing has been violated. Consequently, this part of the communication is inadmissible under article 2 of the Optional Protocol.

10.7 Insofar as the authors allege a violation of their rights under articles 14, paragraph 1, and 26 of the Covenant, because the competent authorities did not qualify as independent and impartial tribunals within the meaning of article 14, paragraph 1, deliberately acted to their detriment, and ex post facto applied the 1992 Provincial Zoning Law to facts that occurred prior to 1992, the Committee observes that article 14, paragraph 1, does not require States parties to ensure that decisions are issued by tribunals at all appellate stages. In this regard, it notes that the Provincial Government's refusal of 4 October 1993, to grant an exception from the zoning regulations was subsequently quashed by the Administrative Court. The Committee concludes that this part of the communication is equally inadmissible under article 2 of the Optional Protocol, for lack of substantiation.

10.8 As for the remaining claims, i.e. alleged delays in the examination of their appeal against the Municipality's decision of 4 February 1987, delays in the proceedings before the Constitutional and Administrative Courts, and in relation to the length of the proceedings as a whole, the Committee must address the State party's objection to the author's status as "victim", the applicability of article 14, paragraph 1, to the facts of the case, and the issue of exhaustion of domestic remedies.

10.9 The Committee is satisfied that the authors have sufficiently substantiated, for purposes of admissibility, that article 14, paragraph 1, of the Covenant applies to proceedings concerning building permits and demolition orders, and that they qualify as victims of a violation of their right, under article 14, to have their case determined without undue delay.

10.10 On the issue of exhaustion of domestic remedies, the Committee notes that the authors have raised the issue of delays in the proceedings in their complaint of 15 January 1996 to the Constitutional Court, which referred the matter to the Administrative Court. The State party has not shown that the authors could have availed themselves of any further remedies to appeal the final decision of the Administrative Court. Moreover, it has not refuted the authors' argument that no remedies exist which would have enabled them to accelerate the proceedings before the Constitutional and Administrative Courts. The Committee is therefore satisfied that the authors have exhausted domestic remedies, in accordance with article 5, paragraph 2 (b), of the Optional Protocol.

10.11 The Committee concludes that the communication is admissible insofar as the length of the examination of the authors' appeal against the Municipality's decision of 4 February 1987 and the proceedings before the Constitutional and Administrative Courts are concerned, and that the delays of the proceedings as a whole raise issues under article 14, paragraph 1, of the Covenant. It proceeds to the examination of these claims on the merits.

Consideration of the merits

11.1 The Committee recalls, at the outset, that the concept of a "suit at law" in article 14, paragraph 1, of the Covenant is based on the nature of the right and obligations in question rather than on the status of the parties.[24] It notes that the proceedings concerning the authors' request for an exemption from the zoning regulations, as well as the orders to demolish their buildings, relate to the determination of their rights and obligations in a suit at law, in particular their right to freedom from unlawful interference with their privacy and home, their rights and interests relating to their property, and their obligation to comply with the demolition orders. It follows that article 14, paragraph 1, is applicable to these proceedings.

11.2 The Committee further recalls that the right to a fair hearing under article 14, paragraph 1, entails a number of requirements, including the condition that the procedure before the national tribunals must be conducted expeditiously.[25] The issue before the Committee is therefore whether the delays complained of violated this requirement, to the extent that they occurred or continued after the entry into force of the Optional Protocol for the State party.

11.3 As to the alleged delay in examining the authors' appeal of 18 February 1987, the Committee notes that the authors themselves requested a postponement of the decision until November 1987. Although it thereafter took the Provincial Government another two years to set aside the impugned decision, of which 20 months coincide with the period of time following the entry into force of the Optional Protocol for the State party, the Committee considers that the authors have not demonstrated that this delay was so unreasonable, as to amount to a violation of article 14, paragraph 1, taking into account that: (a) the delay had no detrimental effect on their legal position; (b) the authors chose not to avail themselves of available remedies to accelerate the proceedings; and (c) the outcome of the appellate proceedings was beneficial to them.

11.4 Regarding the alleged delays in the proceedings before the Constitutional Court (16 November 1993 to 29 November 1994 and 15 January 1996 to 29 September 1998), the Committee observes that, while the first set of these proceedings were conducted expeditiously, the second may have exceeded the ordinary length of proceedings resulting in a complaint's dismissal and referral to another court. However, in the Committee's view, the second delay is not so long as to constitute, in proceedings before a constitutional court in a property-related matter, a violation of the concept of fairness enshrined in article 14, paragraph 1, of the Covenant.

11.5 As to the alleged delays in the proceedings before the Administrative Court (29 November 1994 to 12 October 1995 and 29 September 1998 to 3 November 1999), the Committee has noted the State party's uncontested argument that the authors could have filed their complaints simultaneously with the Constitutional and Administrative Courts, to avoid a loss of time. In the light of the complexity of the matter complained of, as well as the Court's detailed legal reasoning in its decisions of 12 October 1995 and 3 November 1999, the Committee does not consider that the delays complained of amount to a violation of article 14, paragraph 1, of the Covenant.

11.6 The Committee notes that the length of the proceedings as a whole, counted from the date of entry into force of the Optional Protocol for Austria (10 March 1988) to the date of the Administrative Court's final decision (3 November 1999), totalled 11 years and 8 months. In assessing the reasonableness of this delay, the Committee bases itself on the following considerations: (a) the length of each individual stage of the proceedings;[26] (b) the fact that the suspensive effect of the proceedings vis-à-vis the demolition orders was beneficial, rather than detrimental, to the authors' legal position; (c) the fact that the authors did not avail themselves of possibilities to accelerate administrative proceedings or to file complaints simultaneously; (d) the considerable complexity of the matter; and (e) the fact that, during this time, the Provincial Government twice, and the Administrative Court once, set aside negative decisions on appeal by the authors. The Committee considers that these factors outweigh any detrimental effects which the legal uncertainty during the protracted proceedings may have caused to the authors. It concludes, having regard to all the circumstances of the case, that their right to have their case determined without undue delay has not been violated.

12. The Human Rights Committee, acting under article 5, paragraph 4, of the Optional Protocol, is of the view that the facts before it do not disclose a violation of article 14, paragraph 1, of the Covenant.

[Adopted in English, French and Spanish, the English text being the original version. Subsequently to be issued also in Arabic, Chinese and Russian as part of the present report.]

Notes

[1] The Covenant and the Optional Protocol to the Covenant entered into force for the State party respectively on 10 December 1978 and 10 March 1988.

Upon ratification of the Covenant, the State party entered a reservation, which reads, in pertinent parts: "[…] 2. Article 9 and article 14 of the Covenant will be applied provided that legal regulations governing the proceedings and measures of deprivation of liberty as provided for in the Administrative Procedure Acts and in the Financial Penal Act remain permissible within the framework of the judicial review by the Federal Administrative Court or the Federal Constitutional Court as provided by the Austrian Federal Constitution. 3. […]. 4. Article 14 of the Covenant will be applied provided that the principles governing the publicity of trials as set forth in article 90 of the Federal Constitutional Law as amended in 1929 are in no way prejudiced […]."

Upon ratification of the Optional Protocol, the State party entered the following reservation concerning article 5, paragraph 2 (a), of the Optional Protocol: "On the understanding that, further to the provisions of article 5, paragraph 2, of the Protocol, the Committee provided for in article 28 of the Covenant shall not consider any communication from an individual unless it has been ascertained that the same matter has not been examined by the European Commission on Human Rights established by the European Convention for the Protection of Human Rights and Fundamental Freedoms."

[2] See European Court of Human Rights, decision on the admissibility of application No. 74262/01 (*Franz and Maria Deisl v. Austria*), 29 January 2002.

[3] The authors refer to communication No. 387/1989, *Karttunen v. Finland*, Views adopted on 23 October 1992, at para. 7.2.

[4] Reference is made to communication No. 207/1986, *Yves Morael v. France*, Views adopted on 28 July 1989, at para. 9.3.

[5] The State party refers to communication No. 490/1992, *A.S. and L.S. v. Australia*, decision on admissibility of 30 March 1993; communication No. 646/1995, *Leonard John Lindon v. Australia*, decision on admissibility of 20 October 1998; communication No. 754/1997, *A. v. New Zealand*, Views of 15 July 1999.

[6] The authors refer to communication No. 158/1983, *O.F. v. Norway*, decision on admissibility of 26 October 1984, at para. 5.2; communication No. 441/1990, *Robert Casanovas v. France*, Views of 19 July 1994, at para. 5.1.

[7] Reference is made to communication No. 72/1980, *K.L. v. Denmark*, decision on admissibility of 31 July 1980; communication No. 75/1980, *Duilio Fanali v. Italy*, Views of 31 March 1983.

[8] The authors refer to communication No. 24/1977, *Sandra Lovelace v. Canada*, Views of 30 July 1981.

[9] Reference is made to communication No. 196/1985, *Ibrahima Gueye et al. v. France*, Views of 3 April 1989, at para. 5.3.

[10] Reference is made to application No. 29800/96, *Basic v. Austria*, and application No. 30160/96, *Pallanich v. Austria*.

[11] The State party refers to the European Court's judgement of 23 June 1981, *Le Compte, Van Leuven and De Meyere v. Belgium*, Series A 43, at para. 51.

[12] European Court of Human Rights, Judgement of 21 September 1993, *Zumtobel v. Austria*, Series A 268-A, at paras. 31 et seq.

[13] European Court of Human Rights, Judgement of 25 April 1997, *Pauger v. Austria*, application No. 16717/90, at paras. 59 et seq.

[14] The State party refers to European Court of Human Rights, Judgement of 7 July 1989, *Unión Alimentaria Sanders v. Spain*, application No. 11681/85, at para. 35.

[15] Reference is made to the European Court's judgement of 25 June 1987, *Baggetta v. Italy*, application No. 10256/83, at para. 23, as well as to the Report of the European Commission of Human Rights of 12 December 1983, application No. 9132/80, at para. 125.

[16] By way of analogy, the authors refer to the jurisprudence of the European Court of Human Rights in *Eckle v. Germany*, Judgement of 23 June 1982, Series A, No. 51, at para. 82; *Corigliano v. Italy*, Judgement of 10 December 1982, Series A, No. 57, at para. 42; *Dobbertin v. France*, Judgement of 28 January 1993, Series A, No. 256-D, at para. 44; *Francesco Lombardo v. Italy*, Judgement of 26 November 1992, Series A, No. 249-B, at para. 23.

[17] The State party refers to application No. 29800/96, *Basic v. Austria*; application No. 30160/96, *Pallanich v. Austria*; application No. 37323/97, *Talirz v. Austria*; application No. 57652/00, *Lore Wurm v. Austria*.

[18] The authors refer to the European Court's judgement of 23 June 1982, *Eckle v. Germany*, application No. 8130/78, Series A, No. 51, at para. 82.

[19] Reference is made to, inter alia, application No. 23459/94, *Holzinger v. Austria* (No. 1); application No. 30160/96, *Pallanich v. Austria*; application No. 37323/97, *Talirz v. Austria*.

[20] The authors refer to the European Court's decision of 6 June 2002 on application No. 42032/98, *Widmann v. Austria*.

[21] Reference is made, respectively, to application No. 74159/01, *Egger v. Austria*, decision of 9 October 2003, and to the Court's judgement of 22 November 1995, *Bryan v. The United Kingdom*, Series A, No. 335-A, at para. 31.

[22] See communication No. 716/1996, *Pauger v. Austria*, Views adopted on 25 March 1999, at para. 6.4.

[23] See communication No. 520/1992, *Könye and Könye v. Hungary*, decision on admissibility adopted on 7 April 1994, at para. 6.4; communication No. 24/1977, *Sandra Lovelace v. Canada*, Views adopted on 30 July 1981, at para. 7.3.

[24] See communication No. 207/1986, *Yves Morael v. France*, Views adopted on 28 July 1989, at para. 9.3.

[25] See communication No. 441/1990, *Robert Casanovas v. France*, at para. 7.3; communication No. 238/1987, *Floresmilo Bolaños v. Ecuador*, at para. 8.4; communication No. 207/1986, *Yves Morael v. France*, at para. 9.3.

[26] See above paras. 11.4-11.6.

DD. Communication No. 1069/2002, *Bakhtiyari v. Australia* (Views adopted on 29 October 2003, seventy-ninth session)*

Submitted by:	Mr. Ali Aqsar Bakhtiyari and Mrs. Roqaiha Bakhtiyari (represented by counsel Mr. Nicholas Poynder)
Alleged victims:	The authors and their five children, Almadar, Mentazer, Neqeina, Sameina and Amina Bakhtiyari
State party:	Australia
Date of communication:	25 March 2002 (initial submission)

The Human Rights Committee, established under article 28 of the International Covenant on Civil and Political Rights,

Meeting on 29 October 2003,

Having concluded its consideration of communication No. 1069/2002, submitted to the Human Rights Committee by Mr. Bakhtiyari et al. under the Optional Protocol to the International Covenant on Civil and Political Rights,

Having taken into account all written information made available to it by the author of the communication, and the State party,

Adopts the following:

Views under article 5, paragraph 4, of the Optional Protocol

1.1 The authors of the communication, initially dated 25 March 2002, are Ali Aqsar Bakhtiyari, an alleged national of Afghanistan born on 1 January 1957, his wife Roqaiha Bakhtiyari, an alleged national of Afghanistan born in 1968, and their five children Almadar Hoseen, Mentazer Medi, Neqeina Zahra, Sameina Zahra and Amina Zahra, all alleged nationals of Afghanistan, born in 1989, 1991, 1993, 1995 and 1998, respectively. At the time of submission, Mr. Bakhtiyari was resident in Sydney, Australia, while Mrs. Bakhtiyari and the children were detained at Woomera Immigration Detention Centre, South Australia. The authors claim to be victims of violations by Australia of articles 7; 9, paragraphs 1 and 4; 17; 23, paragraph 1; and 24, paragraph 1, of the International Covenant on Civil and Political Rights. The authors are represented by counsel.

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* The following members of the Committee participated in the examination of the present communication: Mr. Abdelfattah Amor, Mr. Nisuke Ando, Mr. Prafullachandra Natwarlal Bhagwati, Mr. Alfredo Castillero Hoyos, Mr. Franco Depasquale, Mr. Maurice Glèlè Ahanhanzo, Mr. Walter Kälin, Mr. Ahmed Tawfik Khalil, Mr. Rajsoomer Lallah, Mr. Rafael Rivas Posada, Sir Nigel Rodley, Mr. Martin Scheinin, Mr. Hipólito Solari Yrigoyen, Ms. Ruth Wedgwood, Mr. Roman Wieruszewski and Mr. Maxwell Yalden.

Under rule 85 of the Committee's rules of procedure, Mr. Ivan Shearer did not participate in the examination of the case.

The text of an individual opinion signed by Committee member Sir Nigel Rodley is appended to the present document.

1.2 On 27 March 2002, the Committee, acting through its Special Rapporteur on new communications, pursuant to rule 86 of the Committee's rules of procedure, requested the State party to refrain from deporting Mrs. Bakhtiyari and her children, until the Committee had had the opportunity to consider their claims under the Covenant, in the event of a negative decision by the Minister for Immigration on their request in October 2001 to exercise his discretion to allow them to remain in Australia. Following the Minister's adverse decision and advice that Mrs. Bakhtiyari and her children had applied to the High Court of Australia, this request to refrain from deportation was adjusted by the Special Rapporteur on new communications, on 13 May 2002, to be conditional on an adverse decision on the application by the High Court.

The facts as submitted

2.1 In March 1998, Mr. Bakhtiyari left Afghanistan for Pakistan where he was subsequently joined by his wife, their five children, and Mrs. Bakhtiyari's brother. Rather than being smuggled to Germany as he had understood, Mr. Bakhtiyari was instead smuggled by an unidentified smuggler to Australia through Indonesia, losing contact with his wife, children and brother-in-law. He arrived unlawfully in Australia by boat on 22 October 1999. On arrival, he was detained in immigration detention at the Port Hedland immigration detention facility. On 29 May 2000, he lodged an application for a protection visa. On 3 August 2000, he was granted a protection visa on the basis of Afghan nationality and Hazara ethnicity.

2.2 Apparently unknown to Mr. Bakhtiyari, Mrs. Bakhtiyari, her children and her brother were also subsequently brought to Australia by the same smuggler, arriving unlawfully by boat on 1 January 2001 and were taken into immigration detention at the Woomera immigration detention facility. On 21 February 2001, they applied for a protection visa, which was refused by a delegate of the Minister of Immigration and Multicultural and Indigenous Affairs ("the Minister") on 22 May 2001 on the ground that language analysis suggested that she was Pakistani rather than Afghan, as claimed by her, and she was unable to give adequate response to questions concerning Afghanistan. On 26 July 2001, the Refugee Review Tribunal ("RRT") dismissed their application for review of the refusal. The RRT accepted that Mrs. Bakhtiyari was Hazara, but was not satisfied that she was an Afghan national, finding her credibility "remarkably poor" and her testimony "implausible" and "contradictory".

2.3 Some time after July 2001, Mr. Bakhtiyari found out from an Hazara detainee who had been released from the Woomera detention facility that his wife and children had arrived in Australia and were being held at Woomera. On 6 August 2001, the Department of Immigration and Multicultural and Indigenous Affairs ("the Department"), as a matter of standard procedure following an unsuccessful appeal to the RRT, assessed the case in the light of the Minister's public interest guidelines,[1] which include consideration of international obligations, including the Covenant. It was decided that Mrs. Bakhtiyari and the children did not meet the test of the guidelines. In October 2001, Mrs. Bakhtiyari applied to the Minister for Immigration requesting that he exercise his discretion under s.417 of the *Migration* Act to substitute, in the public interest, a more favourable decision for that of the RRT, on the basis of the family relationship with Mr. Bakhtiyari.

2.4 In a widely-reported incident on 26 January 2002, Mrs. Bakhtiyari's brother deliberately injured himself at the Woomera facility in order to draw attention to the situation of Mrs. Bakhtiyari and her children. On 25 March 2002, the present communication was lodged with the Human Rights Committee.

2.5 On 2 April 2002, the Minister declined to exercise his discretion in Mrs. Bakhtiyari's favour. On 8 April 2002, an application was made to the High Court of Australia in its original jurisdiction constitutionally to review the decisions of government officials. The application challenged (i) the RRT's decision on the ground that it should have been aware of Mr. Bakhtiyari's presence on a protection visa, and (ii) the Minister's decision under s.417 of the *Migration* Act. The application sought to require the Minister to grant a visa to Mrs. Bakhtiyari and her children based on the visa already granted to Mr. Bakhtiyari.

2.6 On 12 April 2002, as a consequence of receiving information that Mr. Bakhtiyari was not an Afghan farmer, as he had claimed, but rather a plumber and electrician from Quetta, Pakistan, the Department of Immigration and Multicultural and Indigenous Affairs ("the Department") issued him a notice of intention to consider cancellation of his visa and provided him with an opportunity to comment on the allegations. On 26 April 2002, Mrs. Bakhtiyari made a further request to the Minister under s.417 of the *Migration* Act, but was informed that such matters were generally not referred to the Minister while litigation was under way.

2.7 On 11 June 2002, the High Court granted an Order Nisi in respect of the application of Mrs. Bakhtiyari and her children, finding an arguable case to have been established. On 27 June 2002, some 30 detainees, amongst them the eldest sons of Mrs. Bakhtiyari, Almadar and Mentazer, escaped from the Woomera facility. On 16 July 2002, Mrs. Bakhtiyari again made a request to the Minister under s.417 of the *Migration* Act, but was again informed that such matters were generally not referred to the Minister while litigation was under way. On 18 July 2002, the two boys who had escaped gave themselves up at the British Consulate in Melbourne, Australia, and sought asylum. The request was refused and they were returned to the Woomera facility.

2.8 On 2 August 2002, an application was filed with the Family Court in Adelaide on behalf of Almadar and Montazer, seeking orders against the Minister under s.67ZC of the *Family Law* Act 1975[2] for the release of the boys from detention and for them to be made available for examination by a psychologist.

2.9 On 30 August 2002, following Mr. Bakhtiyari's institution of legal proceedings to compel the Department to release to him details of his alleged visa fraud, the Department informed him of the additional information obtained in relation to his identity and nationality, including an application by him for Pakistani identification documentation in 1975, family registration documents of 1973 and 1982 listing his birthplace, citizenship and permanent residence as Pakistani. The letter also referred to pieces of investigative journalism published in major Australian newspapers, where journalists were unable to find any person in the Afghan area from where he claimed to be who knew him, or any further evidence that he had lived there. On 20 September 2002, Mr. Bakhtiyari replied to these issues.

2.10 On 9 October 2002, the Family Court (Dawe J) dismissed the application made to it, finding it had no jurisdiction to make orders in respect of children in immigration detention. On 5 December 2002, Mr. Bakhtiyari's protection visa was cancelled, and he was taken into custody at the Villawood immigration detention facility, Sydney. The same day he lodged an application for review of this decision with the RRT, as well as an application with the Department for a bridging visa seeking his release pending determination of the RRT proceedings. On 9 December 2002, a Minister's delegate refused the request for a bridging visa. On 18 December 2002, the Migration Review Tribunal upheld the decision to refuse a bridging visa.

2.11 Following damage to Woomera in early January 2003, Mrs. Bakhtiyari and the children were transferred to the newly-commissioned Baxter immigration detention facility, near Port Augusta. After the failure of his challenges in the Federal Court against his transfer, on 13 January 2003, Mr. Bakhtiyari was transferred from Villawood to the Baxter facility, to be with his wife and children.

2.12 On 4 February 2003, the High Court, by a majority of five justices against two, refused the application of Mrs. Bakhtiyari and her children to be granted a protection visa on account of Mr. Bakhtiyari's status. The Court found that as the Minister was under no obligation to make a new decision, no object would be served in setting aside his decision, and in any event it was not tainted by illegality, impropriety or jurisdictional error. Likewise, the RRT's decision on their appeal was not tainted by any jurisdictional error.

2.13 On 4 March 2003, the RRT affirmed the decision to cancel Mr. Bakhtiyari's protection visa. On 22 May 2003, the Federal Court (Selway J) dismissed the author's application for judicial review of the RRT's decision, finding its conclusion open to it on the evidence. He lodged an appeal from this decision to the Full Bench of the Federal Court.

2.14 On 19 June 2003, the Full Bench of the Family Court held, by a majority, that the Court did have jurisdiction to make orders against the Minister, including release from detention, if that was in the best interests of the child. The case was accordingly remitted for hearing as a matter of urgency as to what orders would be appropriate in the particular circumstances of the children. On 8 July 2003, the Full Bench of the Family Court granted the Minister leave to appeal to the High Court, but rejected the Minister's application for a stay on the order for rehearing as a matter of urgency. On 5 August 2003, the Family Court (Strickland J) dismissed an application for interlocutory relief, that is, that the children be released in advance of the trial of the question of what final orders would be in their best interests. On 25 August 2003, the Full Bench of the Family Court allowed an appeal and ordered the release of all of the children forthwith, pending resolution of the final application. They were released the same day and have resided with carers in Adelaide since.

2.15 On 30 September and 1 October 2003, the High Court heard the appeal of the Minister against the decision of the Full Court of the Family Court that it had jurisdiction to make welfare orders for children in immigration detention. The Court reserved its decision.

The complaint

3.1 The authors argue that the State party is in actual or potential breach of article 7. They argue that, as it had become apparent that the RRT was in error in finding that Mrs. Bakhtiyari and her children were not Afghan nationals, they would be sent on to Afghanistan if returned to Pakistan. In Afghanistan, they fear that they would be exposed to torture or cruel, inhuman or degrading treatment or punishment. They invoke the Committee's general comment No. 20 on article 7, as well as the Committee's jurisprudence,[3] for the proposition that the State party's responsibility would arise for a breach of article 7 if, as a necessary and foreseeable consequence of, directly or indirectly, deporting Mrs. Bakhtiyari and the children to Afghanistan, they would be exposed to torture or to cruel, inhuman or degrading treatment or punishment.

3.2 The authors also submit that the prolonged detention of Mrs. Bakhtiyari and her children violates articles 9, paragraphs 1 and 4, of the Covenant. They point out that under section 189 (1) of the *Migration* Act, unlawful non-citizens (such as the authors) must be arrested upon arrival. They cannot be released from detention under any circumstances short of removal or being granted a permit, and there is no provision for administrative or judicial review of detention. No justification has been provided for their detention. Thus, applying the principles set out by the Committee in *A. v. Australia*,[4] the authors consider their detention contrary to the Covenant, and they seek adequate compensation.

3.3 The authors claim that deportation of Mrs. Bakhtiyari and her children would violate articles 17 and 23, paragraph 1. The authors compare these provisions to the corresponding articles (12 and 8) of the European Convention on Human Rights, and consider the Covenant rights to be expressed in stronger and less restricted terms. As a result, the individual's right to respect for family life is paramount over any right of the State to interfere, and thus the "balancing exercise" and "margin of appreciation" characteristic of decisions of the European organs will be of lesser importance in cases arising under the Covenant. Against this background, the authors invite the Committee to follow the approach of the European Court of Human Rights to the effect of being restrictive to those seeking entry to a State to create a family, but more liberal to non-citizens in existing families already present in a State.[5]

3.4 In Covenant terms, the removal of Mrs. Bakhtiyari and her children, which will separate them from Mr. Bakhtiyari, amounts to an "interference" with the family. While the interference is lawful, it should also, according to the Committee's general comment No. 16 on article 17, be reasonable in the particular circumstances of the case. In the authors' view, to return Mrs. Bakhtiyari and her children to Afghanistan in circumstances where Mr. Bakhtiyari, an Hazara, is unable to return safely to that country in the light of the uncertain situation, would be arbitrary.

3.5 The authors finally argue a violation of article 24, paragraph 1, which should be interpreted in the light of the Convention on the Rights of the Child. No justification has been provided for the prolonged detention of the children, in "clear" violation of article 24. No consideration has been given to whether it would be in their best interests to have spent over a year in an isolated detention facility, or to be released; detention has been a measure of first, rather than last, resort. It is no answer to say that the best interests of the children were served by co-locating them with Mrs. Bakhtiyari as no justification for her prolonged detention has been supplied, and there is no reason why she could not have been released with the children pending determination of their asylum claims. In any event, as soon as it became known that Mr. Bakhtiyari had been granted a permit and was residing in Sydney, the children should have been released into his care.

3.6 As to issues of admissibility, the authors observe that while Mrs. Bakhtiyari and her children could have sought judicial review in the Federal Court of the RRT's decision affirming the refusal of a protection visa, they did not do so because there was no identifiable error of law which would have given rise to a claim that the RRT's decision should be set aside, and thus such an application would have been futile. The RRT's decision was based on an error of fact, that Mrs. Bakhtiyari and her children were not Afghan nationals. This, according to the authors, was clearly wrong, as Mr. Bakhtiyari had, unbeknown to the RRT, satisfied the State party's immigration authorities at the time that he had applied for a protection visa that he was an Afghan national, entitled to protection. However, it is well-established under the State party's law that wrong findings of fact are not reviewable by the courts.[6] In any event, the mistake of fact only came to light after the non-extendable 28 day time limit for applications to the Federal Court had passed.

3.7 The authors contend that it may have been possible to apply to the High Court under its original jurisdiction to review decisions of government officials, however any prospects of success in such proceedings were removed by the entry into force on 27 September 2001 of the *Migration Amendment (Judicial Review)* Act 2001, which provided that RRT decisions are final and conclusive, and cannot be challenged, appealed against, reviewed, quashed or called into question in any court. (On this point, in a subsequent submission of 9 April 2002, the authors' counsel stated that he had been unaware of the possibility of an arguable case before the High Court, as was in fact subsequently lodged after receipt of additional legal advice from other sources. Given the novelty of the application, there was "considerable doubt" at the time that the application would succeed.) In terms of the Minister's power to exercise his discretion under section 417 of the *Migration* Act, a refusal to so act cannot be appealed or reviewed in any court.

3.8 The authors state that the same matter has not been submitted for examination under another procedure of international investigation or settlement.

Subsequent issue of request for interim measures of protection

4.1 On 8 May 2002, the authors provided the Committee with a psychologist's report dated 2 December 2001, a report of the South Australian State government's Department of Human Services dated 23 January 2002, and a report of an Australian Correctional Management Youth Worker dated 24 January 2002. These reports found that ongoing detention was causing deep depressive effects upon the children, and the two boys Almadar and Mentazer. The reports referred to a number of instances of self-harm, including instances where the two boys stitched their lips together (Almadar on two occasions), slashed their arms (Almadar also cut the word "Freedom" into his forearm), voluntarily starved themselves and behaved in numerous erratic ways, including drawing disturbed pictures. In addition, the children witnessed Mrs. Bakhtiyari's lips sewn shut. The Department for Human Services strongly recommended as a result that Mrs. Bakhtiyari and the children have ongoing assessment outside the Woomera facility.

4.2 On 13 May 2002, the Committee, acting through its Special Rapporteur on new communications, pursuant to rule 86 of the Committee's rules of procedure, requested that the State party inform the Committee within 30 days of the measures it had taken on the basis of evaluation by the State party's own expert authorities that, as a result of incidents of self-harm inflicted by at least two of the children upon themselves, Mrs. Bakhtiyari and her children should have ongoing assessment outside of Woomera detention centre, in order to ensure that further such acts of harm were not suffered.

4.3 By submission of 18 June 2002, the State party responded to the Committee's request. The State party observed that the family is closely monitored, and that individual care and case management plans are in place and regularly reviewed. It points out that the standard of medical care available at the Woomera facility is "very high", including continuous cover by a general medical practitioner and nurses, including a psychiatric nurse, as well as availability of psychologists and counsellors, dentists and an optometrist. A range of recreational and educational facilities are available to assist in the maintenance of mental health and to foster individual development.

4.4 As to the issue of release from detention, the State party did not consider such a course would be appropriate. Detailed consideration was being given to the family situation, and their circumstances were known to the Minister and to the Department. The State party pointed out that its processes had determined that it did not owe protection obligations to Mrs. Bakhtiyari and her children. In addition, the Minister personally considered the case, inter alia in the light of the State party's obligations including the Covenant, and decided that it would not be in the public interest to substitute a more favourable decision. In addition, as Mr. Bakhtiyari's visa was under consideration for cancellation for alleged fraud, it would not be considered appropriate to release Mrs. Bakhtiyari and the children at that time.

4.5 By letter of 8 July 2002, the authors responded to the State party's observations pursuant to the Committee's request, contesting that the standard of medical care provided was as contended by the State party. Reference was made to evidence provided to the (then) ongoing National Inquiry into Children in Immigration Detention conducted by the Human Rights and Equal Opportunities Commission, where a variety of State departments were sharply critical of the level of health services and staffing provided, including concerning mental health and development needs, dental and nutritional issues. There was also considerable criticism of educational facilities, from pre-school level onwards, falling well short of services provided to Australian children, and of scarce access to recreational programmes.[7]

4.6 As to the State party's contention that Mrs. Bakhtiyari and her children should not be released as it had been determined that no protection obligations were owed, the authors pointed out that the requirement not to detain a person arbitrarily did not depend on the existence of an obligation to provide protection, but rather on whether there were sound grounds justifying detention. In any event, legal proceedings continued to challenge the decision not to grant a protection visa. Moreover, the principle of family unity required that they, as dependents of Mr. Bakhtiyari, who had been granted a protection visa, should be released to join him. As to the move to cancel Mr. Bakhtiyari's visa on the basis of allegations that he was from Pakistan and a linguistic analysis of dialect, counsel stated that the State party had refused repeated requests for access to the allegations and the analysis, and that this information was being sought by legal action. In addition, a language analysis carried out by his own expert, as well as statements from people that knew him in Afghanistan, confirmed his original evidence.

4.7 By letter of 12 September 2002, the authors provided the Committee with an Assessment Report, dated 9 August 2002, of the Department of Human Services (Family and Youth Services). The assessment was requested by the Department of Immigration and Multicultural and Indigenous Affairs in order to advise on what would be the best living situation for the family. The report recommended, inter alia, that Mrs. Bakhtiyari and her children be released into the community in order to prevent further social and emotional harm being done to the children, especially the boys. Ideally, this would be via a temporary bridging visa, but release as a total family unit to a residential housing option would also be an improvement. If the family had to remain in detention, the family should be transferred to the Villawood facility in Sydney for easier access to Mr. Bakhtiyari. In addition, increased and better-focused health, education and recreational resources should be provided, as well as greater care taken to protect and shield children from situations of danger and trauma within the compound. This report was tabled in the South Australian parliamentary House of Assembly, with the Premier requesting the federal government to respond and act upon the recommendations.

The State party's submissions on the admissibility and merits of the communication

5.1 By submission of 7 October 2002, the State party contests both the admissibility and the merits of the communication. In the first instance, the State party submits that the entire communication should be dismissed for failure to exhaust domestic remedies, as at that point the authors' High Court action, which could have resulted in a full remedy, was still pending. In addition, with respect to article 9, the State party argues that an action in habeas corpus under the *Constitution* Act 1901 would provide a means by which the lawfulness of any detention, administrative or otherwise, may effectively be judicially tested.

5.2 As to the claims under article 7, the State party argues that this aspect of the communication should be declared inadmissible for lack of sufficient substantiation. The authors simply assert, without any explanation, that if deported to Pakistan, they will be sent on to Afghanistan and face treatment contrary to article 7.

5.3 Firstly, the State party points out that both the original decision maker and the RRT made findings of fact that Mrs. Bakhtiyari and the children were not from Afghanistan. The original decision maker noted that she was unable to name the Afghan currency, any of the larger towns or villages around her home village, any of the names of the provinces surrounding her home or which she had passed through on her way out of the country, or a river or mountain near her village. In drawing adverse inferences concerning her veracity, the decision maker made explicit allowance for her age, level of education, gender and life experience in determining the level of knowledge she could be reasonably expected to have, acknowledging limitations suffered by her as a woman in a Muslim country. The RRT also noted, inter alia, that the results of linguistic analysis showed a distinct Pakistani accent, and that she could name neither the Afghan currency nor the years in the Afghan calendar in which her children were born. While she had been unable to provide any information to the original decision maker concerning her travel route from Afghanistan, by the time she reached the RRT her story had, in the RRT's words, "considerably evolved" and it took the view that she had clearly been coached in the intervening months.

5.4 The State party invites the Committee to follow its approach to fraudulent nationality in *J.M. v. Jamaica*,[8] where the State party, in response to a claim of denial of passport, presented information to the effect that at no stage was the author a Jamaican or had possessed a Jamaican passport; moreover, he was unable to provide the most basic information about Jamaica despite having claimed to live there before losing his passport. The Committee accordingly found he had failed to establish he was a Jamaican citizen and thus failed to substantiate his claims of violation of the Covenant. In the instant case, two decision makers found, as fact, that Mrs. Bakhtiyari and her children were not Afghan nationals, and no new contrary evidence has been provided by the authors; thus, there is no basis for the claim that they would be sent on to Afghanistan, if returned to Pakistan.

5.5 Secondly, even if they were from Afghanistan, they have not substantiated, for purposes of admissibility, that they would be exposed to torture or other cruel, inhuman or degrading treatment or punishment. The onus lies on the authors to show a risk of such treatment. The State party points out that UNHCR estimates that 70-80 per cent of Afghanistan is safe for returnees, and there is nothing to suggest that the Bakhtiyaris would not be in such safe areas. UNHCR also confirms a substantial positive change in the situation for Hazaras, with significantly less discrimination against them. Accordingly, the claims under article 7 have not been sufficiently substantiated.

5.6 The State party separately argues, with respect to the article 7 claims, that they should be dismissed for failure to disclose an "actual grievance". In *A.R.S. v. Canada*,[9] for example, the Committee found a communication inadmissible under articles 1 and 2 of the Optional Protocol on the grounds that it was merely hypothetical. In the present case, as Mrs. Bakhtiyari and her children had initiated actions in the High Court as well as the Family Court, consideration had not been given to whether they would be removed from Australia, and, if so, where. These issues would await the outcome of the legal processes which were pending. Thus, the claims regarding return to Afghanistan, and consequential breach of article 7, are hypothetical and inadmissible.

5.7 As to the merits of the communication, the State party argues that no violation of the Covenant is disclosed. Concerning the claims under article 7, the State party refers to its arguments on the admissibility of this claim, pointing out that, having been found not to be Afghan nationals, there is no evidence that Mrs. Bakhtiyari and her children would be sent on to Afghanistan from Pakistan, much less face, as a necessary and foreseeable consequence, a particular or real risk of torture or cruel, inhuman or degrading treatment or punishment there.

5.8 Regarding the claim under article 9, paragraph 1, the State party considers that the detention is reasonable in all the circumstances and continues to be justified, given the factors of the particular family situation. Mrs. Bakhtiyari and her children arrived unlawfully, and were required to be detained under the *Migration* Act. That being so, it was appropriate that the children remain with their mother in detention, rather than be housed in alternative arrangements. The purposes of detention of unlawful arrivals is to ensure availability for processing protection claims, to enable essential identity, security, character and health checks to be carried out, and to ensure availability for removal if protection claims are denied. These purposes reflect the State party's sovereign right under international law to regulate admittance of non-citizens, and accordingly the detention is not unjust, inappropriate or improper; rather, it is proportionate to the ends identified.

5.9 The State party emphasizes that while in detention, individuals are provided with free legal advice to apply for protection visas, and considerable resources have been invested to provide for more rapid processing of claims, and correspondingly shorter durations of detention.

In the present case, the claims were promptly processed: Mrs. Bakhtiyari's application, made on 21 February 2001, was refused by the original decision maker on 22 May 2001. She was informed of the RRT's decision on her appeal on 26 July 2001. Thereupon, the Minister denied her request for discretionary action under section 417 of the *Migration* Act. That Act now requires Mrs. Bakhtiyari to be removed as soon as "reasonably practicable". However, as they themselves petitioned the Minister and subsequently engaged legal action, the usual steps concerning removal have been delayed pending the outcome.

5.10 The State party rejects the claim that the children should have been released into their father's care. At the time of the submissions, his visa was liable to cancellation on the basis of fraud, namely that he too was a Pakistani national, and his response to the adverse information was before the Department. Cancellation of the visa would result in being placed in immigration detention, and thus it was not considered appropriate to release the children into his care.

5.11 As to the claim under article 9, paragraph 4, the State party observes that the Committee found in *A. v. Australia* that arbitrary detention contrary to article 9, paragraph 1, should be able to be tested before a court. The State party however reiterates its position in response to the Committee's Views in *A. v. Australia* that there was nothing in the Covenant to indicate that the word "lawful" was intended to mean "lawful at international law" or "not arbitrary". Where lawful is otherwise utilized in the Covenant, it clearly refers to domestic law (arts. 9 (1), 17 (2), 18 (3) and 22 (2)). Nor do the Committee's general comments, nor the *travaux préparatoires* to the Covenant suggest any such notion. If article 9, paragraph 4, were to have extended meaning beyond domestic law, it would have been a simple matter for the drafters to add "arbitrary" or "in breach of the Covenant". At least, such a broad interpretation would be expected to be reflected in the debate and discussion preceding the agreement on the text, but the *travaux* show that this provision "did not give rise to much discussion". In the present case, recourse to the habeas corpus jurisdiction of the High Court, possibly funded by legal aid, gives the authors the right to challenge the lawfulness of their detention, consistent with article 9, paragraph 4. While they have failed to take advantage of this right, they cannot be said to have been denied recourse to it.

5.12 As to the claims under articles 17 and 23, paragraph 1, the State party argues, firstly, that "interference" refers to acts that have the result of inevitably separating the family unit. In this respect, the State party considers the individual opinion of four members of the Committee in *Winata v. Australia*[10] to reflect correctly the prevailing view of international law when they stated that: "It is not all evident that actions of a State party that result in changes to long-settled family life involve interference with the family, when there is no obstacle to maintaining the family's unity." In the present case, Mr. Bakhtiyari is free to leave with his wife and children, and travel arrangements will be facilitated if needed. If he chooses to remain, that is his own decision rather than that of the State party. The State party thus rejects that, in enforcing its immigration law, it is interfering with the family unit in this case.

5.13 In any event, any interference is not arbitrary. The State party rejects that its laws concerning removal of unlawful non-citizens could be characterized as arbitrary; aliens do not, under international law, have the right to enter, live, move freely and not be expelled.[11] The laws are reasonable, being based upon sound public policy principles consistent with the State party's standing as a sovereign nation and with its international obligations, including under the Covenant. The laws are predictable, in that information about them is widely available, and they are applied in consistent fashion, without discrimination. If these laws are applied to Mrs. Bakhtiyari and her children, it will be the predictable and foreseeable operation, that has been explained to them, of having exhausted the available application and appeals processes, which give extensive consideration to their individual circumstances and to the State party's non-refoulement obligations.

5.14 As to article 23, paragraph 1, the State party refers to Nowak's characterization of this obligation as requiring the establishment of marriage and family as special institutions in private law and their protection against interference by State as well as private actors.[12] There is a comprehensive federal system of family law, complemented by rigorous child protection laws in States and Territories, which are backed up by State and Territory departments and specialist units with police services. These laws apply to persons in immigration detention (except as inconsistent with federal law). The State has introduced programmes and policies to support families in immigration detention, prescribing appropriate standards for the relevant service providers. Medical staff, including nurses, counsellors and welfare officers, support and assist parents to care for children and meet parental responsibilities. State child welfare agencies also provide appropriate parenting skills training. The State party thus rejects that it has failed to protect the family as an institution; it has put in place laws, practices and policies designed to protect and support families, including those in immigration detention.

5.15 In terms of the claims under article 24, paragraph 1, the State party, as a preliminary matter, rejects that this provision should be interpreted in a similar way to the Convention on the Rights of the Child (CRC). The Committee has noted that it is not competent to examine allegations of violations of other instruments,[13] and should thus restrict its consideration to Covenant obligations. It is clear, in any event, that article 24, paragraph 1, is different in nature to CRC rights and obligations, being, as described by Nowak, a comprehensive duty to guarantee that all children within a State party's jurisdiction are protected,[14] whether through support for the family, through support for corresponding private facilities for children, or other measures. The obligation is not complete, extending only to such protective measures as required by the child's status as a minor.

5.16 The State party submits this obligation has been met with respect to the Bakhtiyari children. It refers to the information on the level of medical, educational and recreational services outlined in its response to the Committee's request for information pursuant to rule 86 of its rules of procedure.[15] In addition, all staff in detention facilities must advise local child protection authorities if they consider a child is at risk of harm; to this effect, concerning the Woomera facility, an arrangement was formalized between the Department and the South Australian State Department of Human Services on 6 December 2001.

5.17 Within immigration detention, as generally in the State party, child supervision is a parental responsibility and thus, while general statements can be made about services and facilities available, attendance records are not usually kept. Following the concern about the Bakhtiyaris' well-being, however, special protective measures were implemented. An officer has been specifically assigned to monitor the children's participation in educational and recreational activities, and to work with Mrs. Bakhtiyari to encourage these ends. Records indicate that the two eldest boys attend school regularly, use computer facilities, play soccer regularly and attend exercise classes. They attend regular pool excursions and enjoy watching television, while Muntazar has actively taught other children cycling. Of the other children, the school-aged girls attend school and participate in recreational activities, including sewing with their mother.

5.18 Following concerns about the family, the Department requested the local child welfare authorities (under the auspices of the South Australian State Department of Human Services) to assess the family at the facility. The family did not cooperate with the August 2002 assessment, and Mrs. Bakhtiyari did not allow the authorities to speak to the two eldest sons, which compromised the assessment. An independent psychologist made an assessment on 2 and 3 September 2002, and made recommendations the Department is considering.

5.19 The State party argues that consideration has been given to whether the children should remain in detention. In October 2001, when Mrs. Bakhtiyari applied to the Minister under section 417 of the *Migration* Act, it was known that Mr. Bakhtiyari was in the community. However, there was also information to suggest that he may have committed visa fraud. The Minister considered all these factors in reaching his decision not to substitute a more favourable decision for that of the RRT. As Mr. Bakhtiyari's visa was, at the stage of the State party's submission, under consideration for cancellation, it would be inappropriate to release the children to his custody.

5.20 The State party observes, in closing, that efforts have been made to ensure Mrs. Bakhtiyari and the children have access to the most comfortable facilities. In August 2002, they were offered a transfer to the new Baxter facility, having contended that the Woomera facility was isolated and too harsh for children. The Baxter facility possesses a family compound, as well as superior educational facilities in a purpose-built school. As at the time of submissions, they had refused to move despite lengthy discussions with staff, preferring to remain at the Woomera facility. The option to transfer nonetheless remained open.

The authors' comments on the State party's submissions

6.1 By letter of 31 March 2003, the authors responded to the State party's submissions, observing that, as at that point, with the High Court's dismissal of their application, Mrs. Bakhtiyari and the three youngest children had no further legal options by which they could remain in Australia, and would be detained until deportation. Success for the two sons Alamdar and Montazer before the Family Court could result in their release from detention. Mr. Bakhtiyari's only prospect to remain in the State party was if he was successful in his application to the Federal Court to overturn the RRT's affirmation of his visa cancellation.

6.2 In response to the State party's submissions, the authors contend that Mr. Bakhtiyari's detention for nine months until the grant of his visa breached article 9, paragraphs 1 and 4. He disclaims any submission as to his current detention pending deportation. Mrs. Bakhtiyari and her children had been (at the time of the comments) in detention for two years and four months, in violation of articles 9, paragraphs 1 and 4, and 24, paragraph 1. A remedy of habeas corpus is of no assistance as the detentions were, and are, lawful under the State party's law and thus would be bound to fail. As to the children, the forthcoming decision of the Family Court does not detract from their claims of violations to date.

6.3 The authors emphasize the "universal condemnation" of the State party's attempts to justify mandatory detention for all unauthorized arrivals.[16] No justification has been advanced for the prolonged detention of Mrs. Bakhtiyari and the children, and the actual or alleged nationality of the family is irrelevant to this issue. The case is factually indistinguishable from the Committee's Views in *A. v. Australia* and *C. v. Australia*;[17] if anything, the detention of children makes the breaches more serious.

6.4 To the extent that the family has now been reunited in allegedly unlawful detention and that any removal is likely to involve the whole family, the allegation that the removal of Mrs. Bakhtiyari and the children would be in breach of articles 17 and 23, paragraph 1, was at that point no longer maintained.

Supplementary submissions of the parties

7.1 On 7 May 2003, the authors provided the Committee with a letter of 28 April 2003 from the Australian Government Solicitor to the Chief Justice of the Family Court, advising the Court of developments. In particular, as Mrs. Bakhtiyari and her children had no outstanding legal proceedings, the Minister considered himself under a duty, pursuant to section 198 (6) of the *Migration* Act, to remove them as soon as "reasonably practicable", and efforts were being made to secure the necessary documentation to enable their removal. As Mr. Bakhtiyari had an outstanding application for review of the cancellation of his visa (which was subsequently dismissed) as well as an outstanding application for a permanent protection visa (which did not include Mrs. Bakhtiyari or the children), the obligation to remove him had not yet arisen and removal was not imminent.

7.2 The authors considered that removal of Mrs. Bakhtiyari and her children in these circumstances would amount to a breach of articles 7, 17, 23, paragraph 1, and 24 of the Covenant. As a result, on 8 May 2003, the Committee, acting through its Special Rapporteur, pursuant to rule 86 of the Committee's rules of procedure, recalled and renewed the request made not to expel Mrs. Bakhtiyari and her children, pending the Committee's decision in the case.

7.3 On 22 July 2003, during the Committee's seventy-eighth session, the State party made additional submissions, informing the Committee that Mrs. Bakhtiyari and the three daughters were currently resident in the Woomera Residential Housing Project, a facility aimed at special needs of women and children. Their residence was one of eight standard houses in Woomera township, considered to be an alternate place of detention by the Department. Mrs. Bakhtiyari and her three daughters are able to leave the house provided they are escorted by correctional officers. Mr. Bakhtiyari and the two sons remain at the Baxter Immigration Reception and Processing Centre. The sons are over the age limit for release into the Residential Housing Project because of "cultural sensitivities and security". Mr. Bakhtiyari is able to visit his wife and daughters at the Housing Project twice a week.

7.4 By letter of 8 October 2003, the authors responded to the State party's submissions, updating the Committee on the history of proceedings in the Family Court and High Court, with respect to the children, and in the Federal Court with respect to Mr. Bakhtiyari. They argued that in the event the appeal to the High Court was resolved against them, that the children would be returned to detention. They observed that Mrs. Bakhtiyari remains in immigration detention, though currently in Adelaide hospital pending birth of a child. Mr. Bakhtiyari remained in the Baxter facility. If Mrs. Bakhtiyari and her children were to be deported imminently, they would be separated from him.

Issues and proceedings before the Committee

Consideration of admissibility

8.1 Before considering any claims contained in a communication, the Human Rights Committee must, in accordance with article 87 of its rules of procedure, decide whether or not it is admissible under the Optional Protocol to the Covenant.

8.2 As to the State party's argument that domestic remedies have not been exhausted, the Committee refers to its practice that it decides the question of exhaustion of domestic remedies, in contested cases, at the point of its consideration of the communication, not least for the reason that a communication in respect of which domestic remedies had been exhausted after submission could be immediately resubmitted to the Committee if declared inadmissible for that reason. Upon that basis, the Committee observes that the proceedings brought by Mrs. Bakhtiyari and her children in the High Court have, in the intervening period, been adversely concluded. As to the proposed remedy of habeas corpus, the Committee observes, as it has done previously, that as the State party's law provides for mandatory detention of unlawful arrivals, a habeas corpus application could only test whether the individuals in fact possess that (uncontested) status, rather than whether the individual detention is justified. Accordingly, the proposed remedy has not been shown to be an effective one, for the purposes of the Optional Protocol. The Committee thus is not precluded under article 5, paragraph 2 (b), of the Optional Protocol from considering the communication.

8.3 As to the State party's argument that the removal of Mrs. Bakhtiyari and her children is hypothetical and thus there is not an "actual grievance" for the purposes of the Optional Protocol, the Committee observes that, whatever the position might have been at the time the State party lodged its submissions, according to recent information, the State party regards itself under a duty to remove Mrs. Bakhtiyari and her children as soon as is "reasonably practicable" and is taking steps to that end. Accordingly, the claims based on threat of removal of Mrs. Bakhtiyari and her children are not inadmissible for reason of being of hypothetical nature.

8.4 Referring to the arguments that Mrs. Bakhtiyari and her children, if removed to Afghanistan, would be in fear of being subjected to treatment contrary to article 7 of the Covenant, the Committee observes that as the authors have not been removed from Australia, the issue before the Committee is whether such removal if implemented at the present time would entail a real risk of treatment contrary to article 7 as a consequence. The Committee also observes that the State party's authorities, in the proceedings to date, have determined, as a matter of fact, that the authors are not from Afghanistan, and hence they do not stand in fear of being returned to that country by the State party. The authors on the other hand have failed to demonstrate that if returned to any other country, such as Pakistan, they would be liable to be sent to Afghanistan, where they would be in fear of treatment contrary to article 7. Much less have the authors substantiated that even if returned to Afghanistan, directly or indirectly, they would face, as a necessary and foreseeable consequence, treatment contrary to article 7.

The Committee accordingly takes the view that the claim that, if the State party returns them at the present time, Mrs. Bakhtiyari and her children would have to face treatment contrary to article 7, has not been substantiated before the Committee, for purposes of admissibility, and is inadmissible under article 2 of the Optional Protocol.

8.5 As to the claims under articles 17 and 23 deriving from a separation of the family unit, the Committee observes that while these claims were withdrawn on the assumption that once Mr. Bakhtiyari was placed with his family, they would be dealt with together, the most recent information suggests that the State party is moving to remove Mrs. Bakhtiyari and her children, while proceedings in relation to Mr. Bakhtiyari are in process. Consequently, the Committee regards these claims still to be relevant, and considers these and the remaining claims to be sufficiently substantiated, for purposes of admissibility.

Consideration of the merits

9.1 The Human Rights Committee has considered the present communication in the light of all the information made available to it by the parties, as provided in article 5, paragraph 1 of the Optional Protocol.

9.2 As to the claims of arbitrary detention, contrary to article 9, paragraph 1, the Committee recalls its jurisprudence that, in order to avoid any characterization of arbitrariness, detention should not continue beyond the period for which a State party can provide appropriate justification.[18] In the present case, Mr. Bakhtiyari arrived by boat, without dependents, with his identity in doubt and claiming to be from a State suffering serious internal disorder. In light of these factors and the fact that he was granted a protection visa and released two months after he had filed an application (some seven months after his arrival), the Committee is unable to conclude that, while the length of his first detention may have been undesirable, it was also arbitrary and in breach of article 9, paragraph 1. In the light of this conclusion, the Committee need not examine the claim under article 9, paragraph 4, with respect to Mr. Bakhtiyari. The Committee observes that Mr. Bakhtiyari's second period of detention, which has continued from his arrest for purposes of deportation on 5 December 2002 until the present may raise similar issues under article 9, but does not express a further view thereon in the absence of argument from either party.

9.3 Concerning Mrs. Bakhtiyari and her children, the Committee observes that Mrs. Bakhtiyari has been detained in immigration detention for two years and ten months, and continues to be detained, while the children remained in immigration detention for two years and eight months until their release on interim orders of the Family Court. Whatever justification there may have been for an initial detention for the purposes of ascertaining identity and other issues, the State party has not, in the Committee's view, demonstrated that their detention was justified for such an extended period. Taking into account in particular the composition of the Bakhtiyari family, the State party has not demonstrated that other, less intrusive, measures could not have achieved the same end of compliance with the State party's immigration policies by, for example, imposition of reporting obligations, sureties or other conditions which would take into account the family's particular circumstances. As a result, the continuation of immigration detention for Mrs. Bakhtiyari and her children for the length of time described above, without appropriate justification, was arbitrary and contrary to article 9, paragraph 1, of the Covenant.

9.4 As to the claim under article 9, paragraph 4, related to this period of detention, the Committee refers to its discussion of admissibility above and observes that the court review available to Mrs. Bakhtiyari would be confined purely to a formal assessment of whether she was a "non-citizen" without an entry permit. The Committee observes that there was no discretion for a domestic court to review the justification of her detention in substantive terms. The Committee considers that the inability judicially to challenge a detention that was, or had become, contrary to article 9, paragraph 1, constitutes a violation of article 9, paragraph 4.

9.5 As to the children, the Committee observes that until the decision of the Full Bench of the Family Court on 19 June 2003, which held that it had jurisdiction under child welfare legislation to order the release of children from immigration detention, the children were in the same position as their mother, and suffered a violation of their rights under article 9, paragraph 4, up to that moment on the same basis. The Committee considers that the ability for a court to order a child's release if considered in its best interests, which subsequently occurred (albeit on an interim basis), is sufficient review of the substantive justification of detention to satisfy the requirements of article 9, paragraph 4, of the Covenant. Accordingly, the violation of article 9, paragraph 4, with respect to the children came to an end with the Family Court's finding of jurisdiction to make such orders.

9.6 As to the claim under articles 17 and 23, paragraph 1, the Committee observes that to separate a spouse and children arriving in a State from a spouse validly resident in a State may give rise to issues under articles 17 and 23 of the Covenant. In the present case, however, the State party contends that, at the time Mrs. Bakhtiyari made her application to the Minister under section 417 of the *Migration* Act, there was already information on Mr. Bakhtiyari's alleged visa fraud before it. As it remains unclear whether the attention of the State party's authorities was drawn to the existence of the relationship prior to that point, the Committee cannot regard it as arbitrary that the State party considered it inappropriate to unite the family at that stage. The Committee observes, however, that the State party intends at present to remove Mrs. Bakhtiyari and her children as soon as "reasonably practicable", while it has no current plans to do so in respect of Mr. Bakhtiyari, who is currently pursuing domestic proceedings. Taking into account the specific circumstances of the case, namely the number and age of the children, including a newborn, the traumatic experiences of Mrs. Bakhtiyari and the children in long-term immigration detention in breach of article 9 of the Covenant, the difficulties that Mrs. Bakhtiyari and her children would face if returned to Pakistan without Mr. Bakhtiyari and the absence of arguments by the State party to justify removal in these circumstances, the Committee takes the view that removing Mrs. Bakhtiyari and her children without awaiting the final determination of Mr. Bakhtiyari's proceedings would constitute arbitrary interference in the family of the authors, in violation of articles 17, paragraph 1, and 23, paragraph 1, of the Covenant.

9.7 Concerning the claim under article 24, the Committee considers that the principle that in all decisions affecting a child, its best interests shall be a primary consideration, forms an integral part of every child's right to such measures of protection as required by his or her status as a minor, on the part of his or her family, society and the State, as required by article 24, paragraph 1, of the Covenant. The Committee observes that in this case children have suffered demonstrable, documented and ongoing adverse effects of detention suffered by the children, and in particular the two eldest sons, up until the point of release on 25 August 2003, in circumstances where that detention was arbitrary and in violation of article 9, paragraph 1, of the Covenant. As a result, the Committee considers that the measures taken by the State party had not, until the Full Bench of the Family Court determined it had welfare jurisdiction with respect to the children, been guided by the best interests of the children, and thus revealed a violation of article 24, paragraph 1, of the Covenant, that is, of the children's right to such measures of protection as required by their status as minors up to that point in time.

10. The Human Rights Committee, acting under article 5, paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights, is of the view that the facts as found by the Committee reveal violations by Australia of articles 9, paragraphs 1 and 4, and 24, paragraph 1, and, potentially, of articles 17, paragraph 1, and 23, paragraph 1, of the Covenant.

11. In accordance with article 2, paragraph 3 (a), of the Covenant, the State party is under an obligation to provide the authors with an effective remedy. As to the violation of article 9, paragraphs 1 and 4, continuing up to the present time with respect to Mrs. Bakhtiyari, the State party should release her and pay her appropriate compensation. So far as concerns the violations of articles 9 and 24 suffered in the past by the children, which came to an end with their release on 25 August 2003, the State party is under an obligation to pay appropriate compensation to the children. The State party should also refrain from deporting Mrs. Bakhtiyari and her children while Mr. Bakhtiyari is pursuing domestic proceedings, as any such action on the part of the State party would result in violations of articles 17, paragraph 1, and 23, paragraph 1, of the Covenant.

12. Bearing in mind that, by becoming a party to the Optional Protocol, the State party has recognized the competence of the Committee to determine whether there has been a violation of the Covenant or not and that, pursuant to article 2 of the Covenant, the State party has undertaken to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the Covenant, and to provide an effective and enforceable remedy in case a violation has been established, the Committee expects to receive from the State party, within 90 days, information about the measures taken to give effect to the Committee's Views. The State party is also requested to publish the Committee's Views.

[Adopted in English, French and Spanish, the English text being the original version. Subsequently to be issued also in Arabic, Chinese and Russian as part of the present report.]

Notes

[1] The guidelines, provided by the authors, provide that "public interest" factors may arise in a number of circumstances, including where there are circumstances that provide a sound basis for a significant threat to a person's personal security, human rights or human dignity upon return to their country of origin, where there are circumstances that may bring the State party's obligations under the Covenant, the Convention on the Rights of the Child or the Convention against Torture or Other Cruel, Inhuman or Degrading Treatment or Punishment into consideration, or where there are unintended but particularly unfair or unreasonable consequences of the legislation.

[2] Section 67ZC provides:

"(1) In addition to the jurisdiction that a court has under this Part in relation to children, the court also has jurisdiction to make orders relating to the welfare of children.

(2) In deciding whether to make an order under subsection (1) in relation to a child, a court must regard the best interests of the child as the paramount consideration."

[3] *A.R.J. v. Australia* case No. 692/1996, Views adopted on 11 August 1997, and *T. v. Australia* case No. 706/1996, Views adopted on 4 November 1997.

[4] Case No. 506/1993, Views adopted on 4 March 1993.

[5] The authors refer to Lambert, H.: "The European Court of Human Rights and the Right of Refugees and Other Persons in Need of Protection to Family Reunion", (1999) 11 (3) *International Journal of Refugee Law* 427.

[6] *Waterford v. Commonwealth* (1987) 163 CLR 54.

[7] These submissions are available online at www.hreoc.gov.au/human_rights/children_detention/index.html.

[8] Case No. 165/1984, decision adopted on 26 March 1986.

[9] Case No. 91/1981, decision adopted on 28 October 1981.

[10] Case No. 930/2000, Views adopted on 26 July 2001.

[11] C. Tiburcio: "The Human Rights of Aliens under International and Comparative Law", *International Studies in Human Rights,* vol. 65 (Nijhoff, 2001), at 20.

[12] Nowak, M.: *UN Covenant on Civil and Political Rights: CCPR Commentary.* (N.P. Engel, Kehl, 1993), at 402.

[13] The State party refers to *K.L. v. Denmark* case No. 59/1979, decision adopted on 26 March 1980.

[14] Nowak, op. cit., at 426.

[15] See para. 4.3, infra.

[16] The authors refer to a report of the Human Rights and Equal Opportunities Commission "Those who've come across the seas: Detention of unauthorized arrivals", available online at www.hreoc.gov.au/pdf/human_rights/asylum_seekers/h5_2_2.pdf.

[17] Case No. 900/1999, Views adopted on 28 October 2002.

[18] *A. v. Australia* and *C. v. Australia*, op. cit.

APPENDIX

Individual opinion of Committee member Sir Nigel Rodley (dissenting in part)

For the reasons I gave in my separate opinion in *C. v. Australia* (case No. 900/1999, Views adopted on 28 October 2002), I concur with the Committee's finding of a violation of article 9, paragraph 1, but not with its finding of a violation of article 9, paragraph 4.

(*Signed*): Sir Nigel Rodley

[Adopted in English, French and Spanish, the English text being the original version. Subsequently to be issued also in Arabic, Chinese and Russian as part of the present report.]

EE. Communication No. 1080/2002, *Nicholas v. Australia* (Views adopted on 19 March 2004, eightieth session)*

Submitted by:	David Michael Nicholas (represented by counsel, Mr. John Podgorelec)
Alleged victim:	The author
State party:	Australia
Date of communication:	24 April 2002 (initial submission)

The Human Rights Committee, established under article 28 of the International Covenant on Civil and Political Rights,

Meeting on 19 March 2004,

Having concluded its consideration of communication No. 1080/2002, submitted to the Human Rights Committee on behalf of Mr. David Michael Nicholas under the Optional Protocol to the International Covenant on Civil and Political Rights,

Having taken into account all written information made available to it by the author of the communication, and the State party,

Adopts the following:

Views under article 5, paragraph 4, of the Optional Protocol

1. The author of the communication, dated 24 April 2002, is David Nicholas, born in 1941 and currently serving sentence of imprisonment in Port Phillip Prison. He claims to be the victim of a violation by Australia of article 15, paragraph 1, of the Covenant. Without specifying articles of the Covenant, he also alleges that medical treatment he is provided in detention falls short of appropriate standards. He is represented by counsel. The Covenant and the Optional Protocol entered into force for the State party on 13 November 1980 and 25 December 1991.

The facts as presented

2.1 On 23 September 1994, Thai and Australian law enforcement officers conducted a "controlled importation" of a substantial (trafficable) quantity of heroin. A Thai narcotics investigator and a member of the Australian Federal Police (AFP) travelled from Bangkok,

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* The following members of the Committee participated in the examination of the present communication: Mr. Abdelfattah Amor, Mr. Nisuke Ando, Mr. Prafullachandra Natwarlal Bhagwati, Ms. Christine Chanet, Mr. Franco Depasquale, Mr. Maurice Glèlè Ahanhanzo, Mr. Walter Kalin, Mr. Rafael Rivas Posada, Sir Nigel Rodley, Mr. Martin Scheinin, Mr. Hipólito Solari Yrigoyen, Ms. Ruth Wedgwood, Mr. Roman Wieruszewski, and Mr. Maxwell Yalden.

Thailand, to Melbourne, Australia, to deliver heroin which had been ordered from Australia. After arrival, the Thai investigator, operating in conjunction with the AFP, made a variety of calls arranging for handover of the narcotics, which were duly collected by the author and a friend.

2.2 On 24 September 1994, the author and his friend were arrested shortly after handover of the narcotics, and charged on a variety of federal offences under the *Customs* Act, as well as State offences. An ingredient of the federal offences was that the narcotics were imported into Australia "in contravention of [the federal *Customs* Act]".[1] In April 1995, the High Court of Australia handed down its decision in the unrelated case of *Ridgeway v. The Queen*,[2] concerning an importation of narcotics in 1989, where it held that that evidence of importation should be excluded when it resulted from illegal conduct on the part of law enforcement officers.

2.3 At arraignment and re-arraignment in October 1995 and March 1996, the author pleaded not guilty on all counts. It was uncontested that the law enforcement officers had imported the narcotics into Australia in contravention of the *Customs* Act.

2.4 In May 1996, at a pre-trial hearing, the author sought a permanent stay of the proceedings on the federal offences, on the basis that (as in *Ridgeway v. The Queen*) the law enforcement officers had committed an offence in importing the narcotics. On 27 May 1996, the stay was granted, however leaving the State offences unaffected.

2.5 On 8 July 1996, the federal *Crimes Amendment (Controlled Operations)* Act 1996, which was passed in response to the High Court's decision in *Ridgeway v. The Queen*, entered into force. Section 15X[3] of the Act directed the courts to disregard past illegal conduct of law enforcement authorities in connection with the importation of narcotics. On 5 August 1996, the Director of Public Prosecutions applied for the stay order to be vacated. In turn, the author challenged the constitutionality of section 15X of the Act. On 2 February 1998, the High Court, by a majority of five justices to two, upheld the constitutional validity of the amending legislation as well as the validity of lifting the stay on prosecution in the author's case. The matter was thus remitted to the County Court for further hearing.

2.6 As a result, on 1 October 1998, the County Court lifted the stay order and directed that the author be tried. On 27 November 1998, he was convicted of one count of possession of a trafficable quantity of heroin and one count of attempting to obtain possession of a commercial quantity of heroin. The Court sentenced him to 10 years' imprisonment on the first count and 15 years' imprisonment concurrently on the second count. The total effective sentence was thus 15 years' imprisonment, with possibility of release on parole after 10 years.
On 7 April 2000, the Victoria Court of Appeal rejected the author's appeal against conviction, but reduced the sentence to 12 years' imprisonment, with a possibility of release on parole after 8 years. On 16 February 2001, the High Court refused the author special leave to appeal.

The complaint

3.1 The author complains that he is the victim of an impermissible application of a retroactive criminal law, in violation of article 15, paragraph 1, of the Covenant. Were it not for the introduction of the retroactive legislation, he would have continued to enjoy the effect of a permanent stay in his favour. The effect of the legislation was to direct courts, to the detriment of the author, to disregard a past fact that in *Ridgeway v. The Queen* was determinative of a decision to exclude evidence. The author points out that, for all material purposes, the relevant illegal conduct in *Ridgeway v. The Queen* was identical to his own subsequent conduct. The violation is exacerbated in that, during his trial after withdrawal of the stay, a central element of the offence for which he was convicted was criminal conduct on the part of law enforcement authorities.

3.2 The author refers to jurisprudence of the European Court of Human Rights for the proposition that a law cannot be retroactively applied to an accused's detriment.[4] Similarly, national jurisdictions have found impermissible the removal, whether by the courts or by legislation, after the date of a criminal act, of a defence available at the time the offence was committed.[5] By contrast, in Australian law, the presumption against retrospective operation of criminal law is confined to substantive matters, and does not extend to procedural issues, including issues of the law of evidence.

3.3 The author thus argues that the prohibition against retroactive criminal laws covers not only the imposition, aggravation or redefinition of criminal liability for earlier conduct so liable, but also laws that adjust the evidentiary rules required to secure a conviction. Alongside these classes of laws are fundamental requirements that there be certainty in the law, and that an accused ought not be deprived of a benefit of a law to which he was previously entitled. These elements are necessary in order to secure the individual adequate protection against arbitrary prosecution and conviction, and any deprivation thereof would constitute a breach of article 15, paragraph 1, of the Covenant.

3.4 As a result of the above, the author requests that the Committee require Australia to provide him with an effective remedy for the violation suffered, including immediate release, compensation for the violation suffered, and to take steps to ensure that similar violations do not occur in the future.

3.5 The author further contends, without raising any articles of the Covenant, that during his incarceration (four years at the time of submission of the communication) he has suffered serious health problems: these included an attack of bacterial endocartitis (on an already defective heart valve) and removal of an arachnoid cyst resulting in a prostatic enlargement requiring careful treatment to avoid further bacterial attack. As his first attack of endocartitis occurred in the Port Phillip Prison medical unit, he submits that his desire not to be treated there is warranted.

3.6 As to the admissibility of the communication, he argues that all domestic remedies reasonably open to him have been exhausted and points out that the principles of article 15 have neither constitutional nor common law protection in the State party. He argues that any application to the Human Rights and Equal Opportunity Commission would be futile and ineffective as it cannot afford binding relief in case of a violation; it can only offer non-binding recommendations. Alternatively, the author argues that any application of a domestic remedy would be unduly prolonged. He also confirms that the same matter has not been submitted for examination under any other procedure of international investigation or settlement.

The State party's submissions on admissibility and merits

4.1 The State party, by submissions of 20 November 2002, disputes the admissibility and merits, respectively, of the communication. As to a factual clarification, the State party points out that the "controlled operation" conducted in the author's case took place, as was the then current practice, in accordance with the terms of a 1987 ministerial agreement relating to such operations and with detailed Australian Federal Police guidelines. In advance of an operation, a request was made from the Customs Service to the Federal Police to exempt law enforcement officers from detailed customs scrutiny. It was understood, at the time, that such an approach would not jeopardize prosecutions of alleged narcotics traffickers as such evidence of illegal importation had been held to be admissible evidence in other common law jurisdictions.

4.2 The State party argues that the communication is inadmissible *ratione materiae*. It argues that the plain meaning of article 15, paragraph 1, is to proscribe laws seeking retrospectively to make acts criminal that were not offences at the time they were committed. However, as the situation was interpreted by the High Court, the author was convicted under the criminal offence of section 233 (1) (b) of the *Customs* Act, a provision that existed at the time of his arrest and trial.

4.3 The State party argues that section 15X of the amending legislation is not a criminal offence, imposing liability for any behaviour. No person can be charged or convicted with an offence against it, nor does it alter any elements of a criminal offence; rather, it is a procedural law regulating the conduct of trials. The State party refers to the Committee's deference to the national courts on questions of the proper interpretation of domestic law,[6] and argues that if the Committee accepts (as it would be appropriate to do) the High Court's classification of the amending law as a procedural act not going to the elements of any offence, then no issues under article 15, paragraph 1, are raised.

4.4 The State party rejects the author's contention that article 15, paragraph 1, extends beyond a prohibition on retrospective criminal laws to cover any laws operating retrospectively to the disadvantage or detriment of an accused. It submits that this interpretation is not supported by the ordinary meaning of the text of the article, which prohibits laws that seek retrospectively to make acts or omissions criminal (that is, punishable by law), when those acts or omissions were not criminal at the time they were committed. Nor is the author's view supported by the *travaux préparatoires* of the Covenant, which suggest that the objects and purposes of this provision were to prohibit the extension of the criminal law by analogy, to prohibit the retrospective creation of criminal offences, and to ensure that criminal offences were clearly stated in law.[7] Equally, in the case of ***Kokkinakis** v. **Greece*** cited by the author, the European Commission referred specifically to "criminal law", rather than any law, being covered by article 7 of the European Convention on Human Rights when it stated that the "retrospective application of the criminal law where it is to the accused's detriment" is prohibited. As the amending law in the present case does not amount to such a criminal law, the author's case raises no issue under article 15, paragraph 1.

4.5 As to the merits, the State party refers to the arguments made above with respect to the admissibility of the case, in particular that the relevant "criminal offence" remained at all times the unchanged provisions of section 233 (1) (b) of the *Customs* Act, and advances further contentions for the proposition that no violation of article 15, paragraph 1, of the Covenant has occurred. The State party contends that the amending legislation, as a procedural law, merely affected the admissibility of certain evidence in the author's trial.

4.6 The State party further argues that the decision in *Ridgeway v. The Queen* did not create or recognize any "defence"; rather, it concerned the exercise of a court's discretion to exclude certain forms of evidence on public policy grounds. The exercise of a court's discretion to exclude certain evidence may affect a prosecution's outcome, but an evidentiary rule is not the same as a "defence", which is an issue of law or fact that, if proved, relieves a defendant of liability. It follows that if the judgement in *Ridgeway v. The Queen* did not introduce or recognize a defence, then the amending legislation did not remove or vary the existence of any defence.

4.7 The State party also points out that after the amending legislation the courts retain a discretion to exclude evidence which would be unfair to an accused or to the trial process. It also notes that its High Court rejected the notion that the amending legislation was directed at the author, with the judgement of the Chief Justice observing that it did not direct the court to find any particular person guilty or innocent, and that its effect was merely to increase the amount of evidence available to the court.

4.8 As to the author's health concerns, the State party disputes the relevance of these issues to the claim under article 15. The State party observes that the St. Vincent Correctional Health Service, supplying extensive primary and secondary medical care to Port Phillip Prison, provides inter alia 24 hour availability of medical and nursing staff, a 20-bed in-patient ward at the prison, resuscitative facilities (including defibrillation), bi-weekly visits by a consultant physician, and ready availability of transfer in the event of major cardiac problems to St. Vincent's Hospital (possessing a purpose-built 10-bed in-patient ward). These health services comply with all Australian standards, and the State party refutes any suggestion the author is receiving any less than the utmost care and professional treatment.

The author's comments and the State party's further submission

5.1 By letter of 28 March 2003, the author disputed the State party's submissions. In response to the State party's invitation to the Committee to defer to the High Court's assessment of domestic law, the author argues (i) that the Court's powers are circumscribed by Australian law inconsistent with the Covenant, (ii) that the High Court dealt a question of constitutional interpretation rather than the issues under the Covenant presently before the Committee, and (iii) that the authors are not contending that domestic law had been improperly applied, as in *Maroufidou v. Sweden*,[8] but rather that domestic law is inconsistent with the Covenant.

5.2 The author disputes that, on the plain meaning of article 15, paragraph 1, no issue arises under the Covenant. Due to the illegal conduct of the police, an essential element of the offence (an "act or omission" in the terms of the article) could not, based on the criminal law applicable at the time of the offence, be made out. Thus, his conduct did not and could not constitute a criminal offence at the time of the commission of the alleged offence and article 15, paragraph 1, comes into play.

5.3 The author points out that, in contrast to his own submissions, the State party has advanced no international law to support its narrow construction of article 15, paragraph 1, as applicable solely to the offence described in section 233 B of the *Customs* Act. The author emphasizes that if the legislature is barred from enacting retroactive criminal laws, it must also be barred from achieving the same result in practice by criminal laws that are labelled "procedural".

5.4 In the author's view, it is "artificial" in view of the actual effect on the author and in ignorance of the legislative intent lying behind the amending legislation to deny the existence of a retrospective criminal effect in circumstances where otherwise inadmissible evidence of an essential element of the offence is brought into play. Such an argument impermissibly elevates form over substance, for, on any view, the amending legislation - while ignoring the illegal acts of the State party's officers - changed a criminal law to the accused's detriment (whether by altering the law relating to the elements of the offence or by attempting to legalize otherwise illegal police conduct).

5.5 The author argues that Covenant safeguards should be rigorously applied in the light of the serious consequences for the individual and the possibilities for abuse. Because under Australian law, the seriousness of an offence and the concomitant sentence are partly determined by the quantity of drugs involved, State officers on "controlled operations" can pre-determine the potential offences and sentencing range by importing specific amounts. This is particularly significant in the author's case, as despite no evidence of communications or orders placed by him, he was sentenced to a serious penalty of 12 years' imprisonment, clearly influenced by the amounts of narcotics involved.

5.6 As to health issues, the author states that he recently completed radiotherapy treatment for mid-range prostate cancer, and is awaiting the results. If positive, he will then be operated upon for a hernia and hydrocele condition.

5.7 In a subsequent submission of 6 August 2003, the State party provided certain additional comments on the author's submissions. This new submission was received on the very day that the Committee, at its seventy-eighth session, was discussing its Views in the case. In order to provide the author with an opportunity to respond to the State party's new submission, the consideration of the case was deferred. No further comments have been received from the author.

Issues and proceedings before the Committee

Consideration of admissibility

6.1 Before considering any claim contained in a communication, the Human Rights Committee must, in accordance with rule 87 of its rules of procedure, decide whether or not the complaint is admissible under the Optional Protocol to the Covenant.

6.2 The Committee has ascertained that the same matter is not being examined under another procedure of international investigation or settlement for the purposes of article 5, paragraph 2 (a) of the Optional Protocol.

6.3 As to the issues of the standard of medical care provided to the author, the Committee, taking into account the responses of the State party to the points advanced by the author, considers that the author has failed to substantiate, for the purposes of admissibility, the contention that the nature of medical treatment provided to him raises an issue under the Covenant. This aspect of the communication is accordingly inadmissible under article 2 of the Optional Protocol.

6.4 As to the arguments relating to exhaustion of domestic remedies that have been advanced by the author, the Committee observes that, given the absence of the State party's invocation of any such ground of inadmissibility, it need not further address these issues.

6.5 Regarding the State party's argument that the communication falls outside the scope of article 15, paragraph 1, of the Covenant, properly construed, and is thus inadmissible *ratione materiae*, the Committee observes that this argument raises complex questions of fact and law which are best dealt with at the stage of the examination of the merits of the communication.

6.6 In the absence of any other obstacles to the admissibility of the claim under article 15, paragraph 1, of the Covenant, the Committee declares this portion of the communication admissible and proceeds to its consideration of the merits of the claim.

Consideration of the merits

7.1 The Human Rights Committee has considered the present communication in the light of all the information made available to it by the parties, as provided in article 5, paragraph 1 of the Optional Protocol.

7.2 Before addressing the merits of the author's claim under article 15, paragraph 1, of the Covenant, the Committee notes that the issue before it is not whether the possession by the author of a quantity of heroin was or could under the Covenant permissibly be subject to criminal conviction within the jurisdiction of the State party. The communication before the Committee and all the arguments by the parties are limited to the issue whether the author's conviction under the federal *Customs* Act, i.e. for a crime that was related to the import of the quantity of heroin into Australia, was in conformity with the said provision of the Covenant. The Committee has noted that the author was apparently also charged with some State crimes but it has no information as to whether these charges related to the same quantity of heroin and whether the author was convicted for those charges.

7.3 As to the claim under article 15, paragraph 1, the Committee observes that the law applicable at the time the acts in question took place, as subsequently held by the High Court in *Ridgeway v. The Queen*, was that the evidence of one element of the offences with which the author was charged, that is to say, the requirement that the prohibited materials possessed had been "imported into Australia in contravention of the *Customs* Act", was inadmissible as a result of illegal police conduct. As a result, an order staying the author's prosecution was entered, which was a permanent obstacle to the criminal proceedings against the author on the (then) applicable law. Subsequent legislation, however, directed that the evidence of illegal police conduct in question be regarded as admissible by the courts. The two issues that thus arise are, firstly, whether the lifting of the stay on prosecution and the conviction of the author resulting from the admission of the formerly inadmissible evidence is a retroactive criminalization of conduct not criminal, at the time it was committed, in violation of article 15, paragraph 1, of the Covenant. Secondly, even if there was no proscribed retroactivity, the question arises whether the author was convicted for an offence, the elements of which, in truth, were not all present in the author's case, and that the conviction was thus in violation of the principle of *nullum crimen sine lege*, protected by article 15, paragraph 1.

7.4 As to the first question, the Committee observes that article 15, paragraph 1, is plain in its terms in that the offence for which a person is convicted to be an offence at the time of commission of the acts in question. In the present case, the author was convicted of offences under section 233 B of the *Customs* Act, which provisions remained materially unchanged throughout the relevant period from the offending conduct through to the trial and conviction. That being so, while the procedure to which the author was subjected may raise issues under other provisions of the Covenant which the author has not invoked, the Committee considers that it therefore cannot conclude that the prohibition against retroactive criminal law in article 15, paragraph 1, of the Covenant was violated in the instant case.

7.5 Turning to the second issue, the Committee observes that article 15, paragraph 1, requires any "act or omission" for which an individual is convicted to constitute a "criminal offence". Whether a particular act or omission gives rise to a conviction for a criminal offence is not an issue which can be determined in the abstract; rather, this question can only be answered after a trial pursuant to which evidence is adduced to demonstrate that the elements of the offence have been proven to the necessary standard. If a necessary element of the offence, as described in national (or international) law, cannot be properly proven to have existed, then it follows that a conviction of a person for the act or omission in question would violate the principle of *nullum crimen sine lege*, and the principle of legal certainty, provided by article 15, paragraph 1.

7.6 In the present case, under the State party's law as authoritatively interpreted in *Ridgeway v. The Queen* and then applied to the author, the Committee notes that it was not possible for the author to be convicted of the act in question, as the relevant evidence of the unlawful import of narcotics by the police was inadmissible in court. The effect of the definitive interpretation of domestic law, at the time the author's prosecution was stayed, was that the element of the crime under section 233 B of the *Customs* Act that the narcotics had been imported illegally, could not be established due to the fact that although the import had been based on a ministerial agreement between the authorities of the State party exempting import of narcotics by the police from customs scrutiny, its illegality had not technically been removed and the evidence in question was hence inadmissible.

7.7 While the Committee considers that changes in rules of procedure and evidence after an alleged criminal act has been committed, may under certain circumstances be relevant for determining the applicability of article 15, especially if such changes affect the nature of an offence, it notes that no such circumstances were presented in the author's case. As to his case, the Committee observes that the amending legislation did not remove the past illegality of the police's conduct in importing the narcotics. Rather, the law directed that the courts ignore, for the evidentiary purposes of determining admissibility of evidence, the illegality of the police conduct. Thus, the conduct of the police was illegal, at the time of importation, and remained so ever since, a fact unchanged by the absence of any prosecution against the officers engaging in the unlawful conduct. In the Committee's view, nevertheless, all of the elements of the crime in question existed at the time the offence took place and each of these elements were proven by admissible evidence by the rules applicable at the time of the author's conviction. It follows that the author was convicted according to clearly applicable law, and that there is thus no violation of the principle of *nullum crimen sine lege* protected by article 15, paragraph 1.

8. The Human Rights Committee, acting under article 5, paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights, is of the view that the facts before it do not disclose a violation of article 15, paragraph 1, of the Covenant.

[Adopted in English, French and Spanish, the English text being the original version. Subsequently to be issued also in Arabic, Chinese and Russian as part of the present report.]

Notes

[1] Section 233 B (1) (c) of the Customs Act provides:

> "Any person who:
>
> > (c) without reasonable excuse (proof whereof shall lie upon him) has in his possession any prohibited imports to which this section applies which have been imported into Australia in contravention of this Act: …
>
> shall be guilty of an offence".

[2] (1995) 184 CLR 19 (High Court of Australia).

[3] The full text of section 15X of the Act provides, in material part:

> "In determining, for the purposes of a prosecution for an offence against section 233 B of the Customs Act 1901 or an associated offence, whether evidence that narcotic goods were imported into Australia in contravention of the Customs Act 1901 should be admitted, the fact that a law enforcement officer committed an offence in importing the narcotic goods, or in aiding, abetting, counselling, procuring, or being in any way knowingly concerned in their importation, is to be disregarded, if:
>
> > (a) the law enforcement officer, when committing the offence, was acting in the course of duty for the purposes of a [duly exempted] controlled operation …"

[4] *Ecer et al. v. Turkey* Applns. 29295/95 and 29363/95; judgement of 27 February 2001 and *Kokkinakis v. Greece* Series A No. 260-A, 22; judgement of 25 May 1993.

[5] *Kring v. Missouri* (107 US 221), *Dobbert v. Florida* (432 US 282) and *Bouie v. Columbia* (378 US 347) (United States Supreme Court).

[6] *Maroufidou v. Sweden*, communication No. 58/1979, Views adopted on 9 April 1981.

[7] The State party refers to proceedings in the Third Committee (1960), where "Many representatives were in favour of the text submitted by the Commission on Human Rights. The draft article embodies the principle *nullum crimen sine lege*, and prohibited the retroactive application of criminal law. It was pointed out that there could be no offences other than those specified by law, either national or international." M Bossuyt: *Guide to the Travaux Préparatoires of the International Covenant on Civil and Political Rights*, 1987, at 323.

[8] Op. cit.

FF. Communication No. 1090/2002, *Rameka v. New Zealand* (Views adopted on 6 November 2003, seventy-ninth session)*

Submitted by:	Mr. Tai Wairiki Rameka et al. (represented by counsel, Mr. Tony Ellis)
Alleged victims:	The authors
State party:	New Zealand
Date of communication:	9 March 2002 (initial submission)

The Human Rights Committee, established under article 28 of the International Covenant on Civil and Political Rights,

Meeting on 6 November 2003,

Having concluded its consideration of communication No. 1090/2002, submitted to the Human Rights Committee by Mr. Tai Wairiki Rameka et al. under the Optional Protocol to the International Covenant on Civil and Political Rights,

Having taken into account all written information made available to it by the authors of the communication, and the State party,

Adopts the following:

Views under article 5, paragraph 4, of the Optional Protocol

1. The authors of the communication, dated 9 March 2002, are Messrs. Tai Wairiki Rameka, Anthony James Harris and Tai Rangi Tarawa, all New Zealand nationals currently detained serving criminal sentences. They claim to be victims of violations by New Zealand of articles 7, 9, paragraphs 1 and 4, 10, paragraphs 1 and 3, and 14, paragraph 2, of the Covenant. They are represented by counsel.

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* The following members of the Committee participated in the examination of the present communication: Mr. Nisuke Ando, Mr. Prafullachandra Natwarlal Bhagwati, Mr. Alfredo Castillero Hoyos, Ms. Christine Chanet, Mr. Franco Depasquale, Mr. Maurice Glèlè Ahanhanzo, Mr. Walter Kälin, Mr. Ahmed Tawfik Khalil, Mr. Rajsoomer Lallah, Mr. Rafael Rivas Posada, Sir Nigel Rodley, Mr. Martin Scheinin, Mr. Ivan Shearer, Mr. Hipólito Solari Yrigoyen, Mr. Roman Wieruszewski and Mr. Maxwell Yalden.

The texts of individual opinions signed by Committee members Mr. Nisuke Ando, Mr. Prafullachandra Natwarlal Bhagwati, Ms. Christine Chanet, Mr. Maurice Glèlè Ahanhanzo, Mr. Walter Kälin, Mr. Rajsoomer Lallah, Mr. Ivan Shearer, Mr. Hipólito Solari Yrigoyen and Mr. Roman Wieruszewski are appended to the present document.

The facts as presented by the authors

Mr. Rameka's case

2.1 On 29 March 1996, Mr. Rameka was found guilty in the High Court at Napier of two charges of sexual violation by rape, one charge of aggravated burglary, one charge of assault with intent to commit rape, and indecent assault. Pre-sentence and psychiatric reports provided to the court referred inter alia to the author's previous sexual offences, his propensity to commit sexual offences, his lack of remorse and his use of violence, concluding that there was a 20 per cent likelihood of further commission of sexual offences.

2.2 In respect of the first charge of rape, he was sentenced to preventive detention (that is, indefinite detention until release by the Parole Board) under section 75 of the Criminal Justice Act 1985,[1] concurrently to 14 years' imprisonment in respect of the second charge of rape, to 2 years' imprisonment in respect of the aggravated burglary and to 2 years' imprisonment for the assault with intent to commit rape. He was convicted and discharged in respect of the remaining indecent assault charge, as the sentencing judge viewed it as included in the other matters dealt with. He appealed against the sentence of preventive detention as being both manifestly excessive and inappropriate, and against the sentence of 14 years' imprisonment for rape as being manifestly excessive.

2.3 On 18 June 1997, the Court of Appeal dismissed the appeal, finding that the sentencing judge was entitled to conclude, on the evidence, that there was a "substantial risk" that Mr. Rameka would offend again in an aggressive and violent manner upon release, and that there was "a high level of future dangerousness" from which the community had to be protected. The Court supported its conclusion by reference to Mr. Rameka's repeated use of a knife and violence in the context of sex-related offences, and his lengthy detention of his victim in each instance. It also found, with respect to the sentence for rape, that the 14 year term of imprisonment was "well within" the discretion of the sentencing judge.

Mr. Harris' case

2.4 On 12 May 2000, Mr. Harris was found guilty by the High Court at Auckland, following pleas of guilty, of 11 counts of sexual offences occurring over a period of three months against a boy who turned 12 during the period in question. They comprised two charges of sexual violation involving oral genital contact and nine charges of indecent assault or inducing indecent acts in respect of a boy under 12. He had previously been convicted of two charges of unlawful sexual connection with a male under 16 and one of indecently assaulting a male under 12, all in respect of an 11-year-old boy. On the two unlawful sexual connection counts, he was sentenced to six years' imprisonment, and concurrently to four years' on the remaining counts.

2.5 The Solicitor-General, for the Crown, sought leave to appeal on the basis that preventive detention, or at least a longer finite sentence, should have been imposed. On 27 June 2000, the Court of Appeal agreed, and substituted a sentence of preventive detention in respect of each count. The Court referred to the warning of serious consequences given by the court sentencing the author for his previous offences, his failure to amend his behaviour following a sexual offenders' course in prison, the features of breach of a child's trust in offending, the failure to heed police warnings provided to the author against illicit contact with the child victim, as well as the comprehensive psychiatric report defining him as a homosexual paedophile attracted to pre-pubescent boys and the risk factors analysed in the report. While observing that the case would warrant a finite sentence of "not less" than seven and a half years, the Court however concluded, in the circumstances, that no appropriate finite sentence would adequately protect the public, and that preventive detention, with its features of continuing supervision after release and amenability to recall, was the appropriate sentence.

Mr. Tarawa's case

2.6 On 2 July 1999, Mr. Tarawa was found guilty of sexual violation by rape, two charges of sexual violation by unlawful sexual connection, indecent assault, burglary, two charges of aggravated burglary, two charges of kidnapping, being an accessory after the fact, three charges of aggravated robbery, demanding with menaces, and unlawfully entering a building. Previously, he had committed multiple offences in three earlier incidents, involving breaking into homes and engaging in sexually-motivated violence, including two rapes. Subsequently, he committed further burglary and assault. The sentencing judge found a consistent pattern of predatory conduct, planned and executed with professionalism, exacerbated by the fact that some offences were committed while on bail. After considering the nature of the offending, its gravity and timespan, the nature of the victims, the response to previous rehabilitative efforts, the time since previous offending, the steps taken to avoid reoffending, the (non) acceptance of responsibility, the pre-sentence report, the psychological report and the psychiatric assessment of a very high risk of reoffending along with the relevant risk factors, the judge sentenced him to preventive detention in respect of the three sexual violation charges, and encouraged him to make use of the counselling and rehabilitative services available in prison. He was concurrently sentenced to 4 years' imprisonment on the aggravated burglary charge, 6 years for the kidnapping, 3 years for demanding with menaces, 3 years for aggravated burglary and aggravated robbery, 18 months for burglary and being an accessory after the fact, 6 years for a further kidnapping and 5 years for a further aggravated robbery, 6 months for indecent assault and 9 months for unlawful entry.

2.7 On 20 July 2000, the Court of Appeal, examining the appeal on the basis of the author's written submissions, considered the pattern of circumstances of each set of offences and found, on the entire background of the appellant, his unsuccessful rehabilitation efforts as well as the pre-sentence, psychiatric and psychological reports, that the conclusions of substantial risk requiring the protection of the public were open to the sentencing judge, who had properly weighed the available alternatives of finite sentences.

2.8 On 19 September 2001, the Judicial Committee of the Privy Council rejected all three authors' applications for special leave to appeal.

The complaint

3.1 The authors complain, firstly, that the leading case of *R. v. Leitch*,[2] where a Full Court of the Court of Appeal laid out the principles applicable to sentences of preventive detention, was wrongly decided. The authors contend that this decision does not offer meaningful guidance as to how the courts should determine the existence of "substantial risk" of a future offence. In the authors view, this element should be demonstrated to the criminal level of proof beyond all reasonable doubt, as applied by Canadian courts in the context of preventive detention.

They further contend that the elements set out in section 75 (2) of the Criminal Justice Act are excessively vague and arbitrary.[3] They argue in addition that the *Leitch* decision wrongly analyses "expedient for the protection of the public" and incorrectly overruled the previous jurisprudence of the "last resort test". They contend that the Court did not analyse arguments in that case that preventive detention was inconsistent with the Covenant.

3.2 Secondly, the authors contend that it was arbitrary to impose a discretionary sentence on the basis of evidence of future dangerousness, as such a conclusion cannot satisfy the statutory tests of "substantial risk of reoffending" or "expedient for the protection of the public" in the individual case. They point to several writers who caution about the difficulties of predicting of future criminal behaviour and relying on statistical classes and patterns.[4] In any event, they argue that on the facts none of them fit the statutory tests of being a "substantial risk", or that preventive detention was "expedient for protection of the public".

3.3 Thirdly, the authors argue that they were sentenced without regard being paid, by the sentencing court or on appeal, to issues of (i) arbitrary detention, in terms of article 10, paragraphs 1 and 3, of the Covenant, ss.9 and 23 (5) of the New Zealand Bill of Rights Act 1990, the Magna Carta, and/or the Bill of Rights 1689 (Imp.); (ii) presumption of innocence, in terms of articles 9 and/or 14, paragraph 2, of the Covenant, as interpreted by the Committee, (iii) (the alleged absence of sufficient) periodic review of an indeterminate sentence, in terms of article 9, paragraph 4, of the Covenant and (iv) cruel, unusual, inhuman or degrading punishment under article 7 of the Covenant or the Bill of Rights 1689.

3.4 As to the issue of arbitrary detention, the authors argue that there is insufficient regular review of their future "dangerousness", and that they are effectively being sentenced for what they might do when released, rather than what they have done. The authors refer to jurisprudence of the European Court of Human Rights[5] and academic writings[6] in support of the proposition that a detainee has the right to have renewed or ongoing detention that is imposed for preventive or protective purposes to be tested by an independent body with judicial character. The authors observe that under the State party's scheme, there is no possibility for release until 10 years have passed and the Parole Board may consider the case. Concerning the presumption of innocence, the authors contend that preventive detention should be seen as a punishment for crimes which have not yet been, and which may never be, committed, and thus in breach of article 14, paragraph 2.

3.5 In respect of the above two issues, the authors also refer to concerns expressed by the Committee upon its consideration of the State party's third periodic report, concerning the compatibility of the scheme of preventive detention with articles 9 and 14.[7]

3.6 As to issues under articles 7 and 10, the authors argue that due to the 10 year non-parole period applicable to their sentences, potential treatments of sexual offenders aimed at reducing their risk and dangerousness are not made available until close to the expiry of the 10 year period. They also appear to object, in general, to the 10 year non-parole period. This fails to treat persons so sentenced with humanity and dignity, as required by article 10, paragraph 1, fails to take into account the essential aim of reformation and social rehabilitation required by article 10, paragraph 3, and amounts to cruel, unusual, degrading and disproportionately severe punishment, contrary to article 7.

3.7 The authors also make several case-specific claims. Mr. Rameka contends that the Court should not have accepted that an identified 20 per cent risk of reoffending amounted to a substantial risk within the meaning of the statute, and that imposing a concurrent finite sentence at the same time as sentence of indefinite detention was wrong in principle. In the case of Mr. Tarawa, it is claimed that the denial of legal aid for his appeal (resulting in Mr. Tarawa preparing his own appeal papers) was wrong. Finally, Mr. Harris contends that his sentence was manifestly excessive, and that the Court of Appeal improperly considered eligibility for recall, that is to say, the liability of offender who has been released prior to serving full sentence but who commits a further offence to be recalled to serve out a full sentence, to be a relevant factor in favour of a sentence of preventive detention.

The State party's submissions on admissibility and merits

4.1 By submissions of 19 February 2003, the State party contests the admissibility and merits of the communication, describing at the outset the general features of the scheme of preventive detention. It observes that such detention is only imposed on persons aged 21 or above after they have been convicted, following a trial with full rights of fair trial and appeal, in respect of certain designated offences.[8] The sentence is imposed for past acts of serious offending, where it is the appropriate and proportional penalty to respond to the nature of that offending. That assessment of penalty is considered in the context of the offender's past and other information about him/her, including the likelihood of future offending.

4.2 The sentence may arise in two circumstances: firstly, where a person has previous similar convictions for specific serious (mainly sexual) offences, and has again offended. This has existed for some 100 years, and generally is imposed after a last warning from a sentencing judge sentencing the offender, upon an earlier occasion, to a finite term of imprisonment. Secondly, as a result of a 1993 amendment, a person can be sentenced to preventive detention in respect of an offence of sexual violation, independently of previous offences. In this case, however, additional safeguards are built in: the Court must seek a psychiatric report and be satisfied that there is a substantial risk of commission of a further specified offence upon release.

4.3 Safeguards are incorporated both at the imposition stage of the sentence, as well as the administration stage. The only court able to impose such a sentence is the highest court of original jurisdiction, the High Court. There is a right of appeal to the Court of Appeal, which is exercised by most sentenced to preventive detention. Only specific offences give rise to liability to the sentence. Psychiatric reports are, in practice, always sought. The courts consider whether protective purposes could be adequately served by a finite sentence of years. If the High Court does, after consideration of the full facts of the case, impose a preventive sentence, the Court of Appeal may instead substitute a finite sentence (as, for example, occurred in *R. v. Leitch*). According to the criteria set out in *Leitch*, the sentencing court must consider: the nature of the offences, their gravity and time span, the category of victims and the impact on them, the offender's response to previous rehabilitation efforts, the time elapsed since relevant previous offences and steps taken to avoid reoffending, acceptance of responsibility and remorse for the victims, proclivity to offending (taking into account professional risk assessment), and prognosis for the outcome of available rehabilitative treatment. Even if the statutory tests are met, the sentence remains discretionary rather than mandatory.

4.4 Turning to the administration stage, there is generally a minimum non-parole period of 10 years, subject to the discretion of an independent Parole Board to consider the case before that point (s.97 (5)). Thereafter, there are compulsory reviews of the detention undertaken at least annually by the Parole Board, which is authorized to release the prisoner at its discretion (s.97 (2)). The reviews may take place even more frequently if the Parole Board so requires, or the prisoner so requests and the Board agrees (s.97 (3)). The decisions of the Parole Board may themselves be reviewed in the High Court.

4.5 The State party observes that preventive detention is by no means unique to New Zealand, and that, while no communications have yet been brought to the Committee on this issue, the European Court of Human Rights has addressed it in several relevant cases. In *V. v. United Kingdom*,[9] the Court held that the sentence of "detention during Her Majesty's pleasure" was neither arbitrary, inhuman nor degrading. The respondent State party had pointed out that such a sentence enables consideration of the offender's individual circumstances, with release occurring once it is determined to be safe for the public to do so. Similarly, in *T. v. United Kingdom*,[10] the Court, recalling States' duty to take measures for the protection of the public from violent crime, considered that the Convention did not prohibit States subjecting an individual to an indeterminate sentence, where considered necessary for protection of the public.

4.6 The State party submits that it is within its discretion to resort to sentences such as preventive detention, while acknowledging the obligation that such sentences are carefully restricted and monitored, with appropriate review mechanisms in place to ensure that continued detention is justified and necessary. The European Court recognizes that once the purpose of detention has shifted from punishment to detention for prevention purposes, detention can become unlawful if there are no adequate systems of renewal in place at that point. Regular review before a body properly empowered to determine the validity of ongoing detention must be in place. The State party argues that its Parole Board has all these characteristics: it is independent, chaired by a former High Court judge, follows a settled procedure, and has full powers to release prisoners. It examines a case at least annually after 10 years have passed, and possibly earlier and more frequently. In addition, habeas corpus remains available.

4.7 While regarding the scheme under which the authors were sentenced as fully consistent with the Covenant, the State party observes that the scheme has since been modified to reduce the 10-year non-review period to 5 years, and the sentencing Court has to set an appropriate non-parole period individually.

4.8 As to admissibility, the State party argues that the authors are not victims within the meaning of the Optional Protocol, concerning the aspect of the claim relating to the non-reviewability period. Further, one author has not exhausted domestic remedies. While the authors are currently serving sentences, the State party observes that they have not yet served the period that they would have had to serve had they been sentenced to a finite sentence.[11] Rather, they are currently serving the ordinary deterrent part of their sentence, and the preventive aspect has yet to arise. For Messrs. Rameka and Tarawa, any finite sentence would have been at least the equal of the 10-year non-review period (when compulsory annual review begins). Not having served the minimum period necessary for the offending, they are not yet "victims" in respect to the claims concerning preventive detention.

4.9 As to Mr. Harris, while he may have received a finite sentence of less than 10 years, the State party submits that he is currently far short of the point where the preventive aspect of detention arises. Further, at that point, the Parole Board can consider his case, and refusal to do so (which could then make him a "victim" of preventive detention) could be reviewed by the courts. Accordingly, none of the authors are at the present time victims of an "actual grievance", within the meaning of the Optional Protocol, arising from any of the particular features of the scheme of preventive detention complained of. The State party invokes the Committee's jurisprudence in *A.R.S. v. Canada,*[12] where the Committee considered inadmissible, on this basis, the author's complaint concerning a mandatory supervision system that was not yet applicable to him.

4.10 As to Mr. Tarawa, the State party submits that domestic remedies have not been exhausted. On 10 December 2001, the Crimes (Criminal Appeals) Amendment Act 2001 entered into force, providing the author with a right to apply for a full re-hearing of sentence. While leave must be obtained, the Court of Appeal has made plain that applications for re-hearing by persons such as Mr. Tarawa will be granted as a matter of course.[13] The current position for Mr. Tarawa is that if he asks, he will have a fresh appeal against his sentence; however he has not yet applied to do so. His claim is thus inadmissible under article 5, paragraph 2 (b), of the Optional Protocol.

4.11 As to the merits, the State party argues that all the authors' claims are unfounded. Regarding the claims under article 9, the State party argues that it can justify continued detention because the sentence is imposed as punishment for, and response to, proven criminal offending and because as the prevention component increases in focus, appropriate review mechanisms (as described above) concurrently become available. It is however first and foremost a penalty in the same way as discretionary life imprisonment is.

4.12 The State party argues that there are many writers who accept that there are factors and characteristics that make it more likely that a person will reoffend; paedophilia being one example where it is generally accepted that persons with this condition are much more likely to reoffend against children. There are many actuarial models used to assist risk prediction, which assign a scale of increasing values to a number of typically 10 to 12 relevant factors such as previous offending, underlying mental conditions, previous rehabilitative success, and the like. The key question is where the cut-off position is then set. A variety of these models, to which New Zealand has contributed, are in operation around the world. There is common acceptance that risk prediction based on a combination of actuarial models and clinical assessments produces the best results. Thus, the State party submits there is no basis in literature to support the view that predicting future offending in a limited range of offences is so arbitrary that sentence cannot have a preventive component.

4.13 Regarding the claims of the alleged failure of the courts to address international standards and jurisprudence, the State party argues that if the challenges to the consistency with the Covenant are not valid, then the courts cannot be criticized for failure to have regard to alleged inconsistencies. The courts' task is to interpret and apply the law, having regard to international obligations in the case of lack of clarity or ambiguity. In *Leitch*, the authors criticize the court for failing to address these issues, but as the appellant was successful and the sentence of preventive detention quashed, there was no need to address the broader international issues.

Subsequent to the filing of the current communication, counsel for the authors addressed similar arguments to the Court of Appeal in *R. v. Dittmer.*[14] The Court there observed that the *Leitch* court, against the background of the State party's obligations, had set out the Crown's submissions on Covenant issues with approval and pointed out that the relationship of the new regime with the Covenant had been considered in the Justice and Electoral parliamentary committee, and found to be consistent.

4.14 In response to the authors' criticisms of the Court of Appeal's decision in *Leitch*, the State party refers to the Committee's constant jurisprudence that matters of domestic law, and its application to particular facts, are issues for the domestic courts.[15] It points out that the issues involved are very much matters of fact, e.g. "dangerousness", and the scope of particular provisions of domestic law. These issues were fully ventilated at all levels of the domestic court system. As to the Court's interpretation that notions such as "beyond reasonable doubt" were inapt further to qualify the meaning of "expediency", the State party points out that this term has always been interpreted in this manner. To the extent that the authors may be suggesting that the Covenant imposes a standard of "beyond reasonable doubt", the State party argues that this is relevant to the offence, where guilt was established beyond reasonable doubt. It is not an appropriate concept to the determination of the appropriate sentence, which has always been recognized as an area of assessment and judicial discretion.

4.15 As to the authors' challenge to the Court's interpretation of "expediency", the State party observes that they seem to argue that an insufficiently high threshold has been set. The State party contends that this is very much a challenge of the application of a test to the particular facts, and it was open to the sentencing judge to find that the sentence in each case was expedient, and for the superior courts to agree. The Court of Appeal's approach that "expedient" had a standard legislative meaning was orthodox, and its listing of the detailed set of factors that a sentencing court should consider before imposing preventive detention[16] was appropriate.

4.16 On the right to presumption of innocence, the State party submits that there can be no breach, because the authors have not been charged with any further criminal offence. There are no fresh charges or allegations to which the presumption can attach. They were sentenced to preventive detention as the result of being convicted of a nominated offence through a trial that fully respected the presumption of innocence, and satisfying many other requirements. As such, the proper focus is not on whether the law can allow sentencing to take into account the need to protect society based on past offending (the State party submits that it can), but rather whether the review mechanisms in place are adequate to enable proper assessment of the need for continued detention once the prisoner has served the appropriate minimum period.

4.17 As to the alleged violation of article 10, paragraphs 1 and 3, through the provision and the timing of remedial courses, the State party observes that what is claimed in the present case falls well short of what the Committee has generally regarded as a violation of these provisions.[17] It points out that in prison, a large range of courses is available to prisoners, all aiming to improve the skills and understanding of a prisoner to help rehabilitate him or her and thus reduce the risk of reoffending. Some are specifically targeted to sexual offenders, aiming at assisting a prisoner with learning to manage themselves in the community, avoid risk situations and thus minimize likelihood of reoffending. The rule is that a prisoner takes such courses near to release, as their focus is managing the prisoner's conduct once released into the community.

They are therefore most effectively undertaken near the time of release. These courses have nothing to do with access to psychiatric and psychological services and treatment, or the range of general courses, which are all available throughout the duration of the sentence. The State party doubts whether the authors have demonstrated themselves personally to be victims, as the authors have not specified which courses and/or treatment they have had, or any specific inadequacies of them.

Mr. Rameka

4.18 Turning to the particular cases, the State party points out that, for Mr. Rameka, the numerous serious charges all arose from one incident. He knew where the victim lived, decided to rape her, broke into the house wearing a mask, acquired a knife from the victim and subjected her to a four-hour ordeal, raping her twice as well as committing further offences. As someone convicted of sexual violation, Mr. Rameka was eligible for preventive detention if a psychiatric assessment was first obtained, and the sentencing judge was satisfied there was a substantial risk of commission of specified offence following release and further that preventive detention was expedient for the protection of the public. Even if so satisfied, the sentencing judge still had the discretion whether or not to impose the sentence. The psychiatric assessment unusually quantified the risk in a specific way ("20%") rather than, as is usual, generally describing the risk as "high" or "very high". The State party stresses that the question of substantial risk was not decided simply on the basis of this figure. Rather, after analysing the report and its reasoning and underlying factors, as well as the circumstances of Mr. Rameka's previous and present offences, the judge considered preventive detention warranted. The Court of Appeal agreed, noting inter alia the various indices in the psychiatric report, the similarities to the previous offending involving a knife and sustained detention, and the worrying factors of the present offending.

4.19 As to the finite sentence of 14 years' imprisonment for the second rape imposed alongside the sentence of preventive detention, the State party finds it difficult to identify any objectionable aspect to this issue. It is important to recognize the individual crimes committed, not least for the community and in symbolic terms, even if the sentence is served concurrently. Moreover, concurrent finite terms can assist the Parole Board in determining the seriousness of other offences committed at the time of the primary offending.

4.20 Concerning his non-parole period, the State party points out that as a result of the 14-year sentence for the second rape, according to local regulation, he would have to serve a total of 9 years 4 months in prison on that offence alone. Adding punishment for the other offences, there is little doubt that a finite sentence requiring him to serve at least 10 years in prison would have been inevitable. Thus the 10-year non-review period arising under the preventive detention would have been the case without any such sentence, meaning that this claim is not only inadmissible but also unfounded, as he will then be eligible for annual review.

Mr. Tarawa

4.21 As to Mr. Tarawa, the State party observes he pleaded guilty to five separate incidents giving rise to 15 charges, with the main charge from the preventive detention viewpoint being a rape committed after breaking into a woman's home. Thereafter, the woman was subjected to further sexual indignities, abducted and taken to a money machine in order to withdraw money for the assailant. The further incidents included breaking into a home (holding the resident couple at gunpoint and assaulting one before they escaped), burglary of a house, assault and robbery of a 76-year-old woman, and burglary of a farmhouse (threatening the female occupant with a knife, forcing her to undress and tying her up before she escaped).

4.22 The sentencing judge considered Mr. Tarawa's earlier offending, where on two occasions he broke into houses where there was a woman. On the first occasion, he forced her to undress at knifepoint but she was able to escape. The second time the victim was raped twice. The judge considered that the present offence was a replica of the earlier incident, but with more signs of professionalism. There then followed further offending, release on bail, and the final three incidents during release on bail. Two of these were robberies and the third another burglary of a home that had the same hallmarks of a targeted woman with the same sexual focus.

4.23 In the High Court, both a psychologist and psychiatrist separately identified significant risks of reoffending, with any prospects of rehabilitation dependent upon change in a person up to then seen to have a low motivation to improve. In the State party's view, the author poses a risk of the highest magnitude, particularly to women, and the Court of Appeal did not differ from the High Court's sentence.

4.24 Concerning the non-parole period, the judge noted that he would have imposed a finite sentence of 15 to 16 years for the rape if he had not imposed preventive detention, with the result that under local parole laws, he would have had to serve at least 10 years before being eligible for release. Thus, the non-review period is the same as if he had not been sentenced to preventive detention, and, apart from being inadmissible, no Covenant claim arises.

4.25 The issue of legal aid is particular to Mr. Tarawa. At the time, his appeal against sentence was determined by an ex parte system on the papers, where the Court of Appeal determined whether would-be appellants would receive legal aid for the appeal. When the Court decided an appeal was so lacking in merit that aid should not be given, it was faced with the dilemma of deciding what to do with appellants in custody who could not be present in court and who had no lawyer. Accordingly, the Court developed a system of determining these appeals on the papers, giving the appellants an opportunity to file written submissions. This ex parte system was subsequently held unlawful for want of statutory authority by the Privy Council,[18] and thus the State party accepts Mr. Tarawa was wrongly denied legal aid. Since then, remedial legislation has assigned the task of determining legal aid to an independent body with more safeguards for appeals on the papers. At the same time, the legislation provided for all whose appeals had been determined by a method held unlawful to seek a new appeal, which this author has not yet done. The State party submits the option of a fresh appeal is sufficient to redress this claim.

Mr. Harris

4.26 The State party observes, in respect of this author, that he was convicted of 11 counts of sexual offending against a young boy. The sentencing judge sentenced him to a finite term of six years' imprisonment. The Crown appealed against the sentence, arguing that preventive detention should have been imposed, or that the finite sentence was manifestly inadequate and the Court of Appeal agreed. The State party points out that this represents an example of the usual preventive detention case - the author had previous paedophile convictions, served a jail term for them, and on previous sentencing was warned about the likely imposition of preventive detention if he committed a repeat offence.

4.27 In the present case, the author ingratiated himself with a young boy, inducing him to engage in various sexual activities. Police warned him to stay away from the boy after suspicions were aroused, but despite the warning the author was unable to resist further contact and committed further offences. The psychiatric report confirmed that he was a homosexual paedophile with an interest in pre-pubescent boys. Previous rehabilitation efforts, including the State party's specialized sex offender programme, had not worked, and such was his predilection to this offending that he continued despite a warning and knowledge that he was being observed by police. Balancing these factors, the Court of Appeal considered that a finite sentence would not adequately protect the public and that preventive detention was required.

4.28 In response to the author's argument that his sentence was manifestly excessive, the State party submits that the Court of Appeal's conclusion, upheld by the Privy Council, was plainly open to it. The author represents a serious risk to the public, with a finite sentence resulting in release providing inadequate protection. If the author manages to change, he can then be released with appropriate safeguards but until that point, the community and particularly young boys should not be exposed to his predatory conduct.

4.29 As to his eligibility for review of detention, the State party observes that the Court of Appeal would have imposed a finite sentence of seven and a half years on the author as being appropriate punishment, were it not for the need to protect the public. Unlike Mr. Tarawa, the author can theoretically argue that as a result of preventive detention he is subject to a longer non-parole period than if a finite sentence had been imposed. However, the State party submits that once the author reached the point where parole eligibility would have arisen under the applicable finite sentence, he can apply for release to the Parole Board (which has discretionary jurisdiction to consider requests prior to 10 years of preventive detention elapsing). Only in the event of the refusal of such a claim by the Parole Board, itself subject to judicial review, could the author claim to be a victim of the non-parole period.

Comments on the State party's submissions

5.1 The authors, in reply, argue that the Covenant is not directly implemented in domestic law, and that the leading case of *R. v. Leitch* only pays lip service to the Covenant. They consider that the advice of the State party's authorities to Parliament assessing that the amendments to the preventive detention legislation were consistent with the Covenant was self-serving.

5.2 The authors observe that in the European Court cases of *V. v. United Kingdom*[19] and *T. v. United Kingdom*[20] a specific "tariff" period had been set for each individual period, representing the term of punishment during which release was precluded. Only thereafter did the preventive aspect of further detention arise. The authors contend that they do not contest the lawfulness of their preventive sentences per se, but rather that an individualized "tariff" period, followed by regular reviews, should have been set in each case. In the authors' cases, the blanket 10-year non-parole period applies to all of them before the reviews begin. They argue that there has been no instance of the exercise of the Parole Board's discretionary power to review a case earlier than after 10 years; this possibility is therefore illusory. They also allege that habeas corpus and judicial review applications would most likely be unsuccessful, and in any case these remedies would only arise after the 10-year non-parole period had passed.

argue the compatibility of their sentence with the Covenant at an earlier point, rather than when 10 years' imprisonment have elapsed. The communication is thus not inadmissible for want of a victim of a violation of the Covenant.

6.3 As to Mr. Tarawa's case, the Committee observes that after flaws in the earlier system of disposing appeals on the papers after a denial of legal aid became apparent, the State party passed the Crimes (Criminal Appeals) Amendment Act 2001 entitling those affected, including Mr. Tarawa, to apply for re-hearing of dismissed appeals (in Mr. Tarawa's case, the Court of Appeal's dismissal on 20 July 2000 of his conviction and sentence of 2 July 1999). Such an appeal could have challenged the appropriateness, as a matter of domestic law, of imposing preventive detention in view of the particular facts of his case, independently of appellate decisions on the penalty applicable to the facts of other cases. Accordingly, the Committee observes that Mr. Tarawa failed to exhaust a domestic remedy available to him to challenge his sentence at the time of submission of the communication. Thus, his claims relating to the imposition of preventive detention and consequential claims are inadmissible under article 5, paragraph 2 (b), of the Optional Protocol. As to the residual claim concerning the earlier denial of legal aid, the Committee observes that for the same reasons, this claim was deprived of object before the submission of the communication upon the provision of the new ability to appeal coupled with a fresh assessment of legal aid; as a result, this claim is inadmissible under article 2 of the Optional Protocol.

6.4 As to the contention that certain rehabilitation courses were not available to the authors in prison, contrary to articles 7 and 10 of the Covenant, the Committee notes that the authors have not specified in any detail which courses they claim they should be entitled to undertake at an earlier point of imprisonment, and that the State party has observed that all standard courses are available throughout the term of imprisonment, while certain courses of immediate relevance to post-release situations are conducted prior to release in order to enhance the appropriateness of timing. The Committee accordingly considers that the authors have failed to substantiate, for the purposes of admissibility, that the timing and content of courses made available in prison, give rise to claims under articles 7 and 10 of the Covenant.

6.5 As to whether the imposition of preventive detention in the cases of Messrs. Harris and Rameka ("the remaining authors") is consistent with the Covenant, the Committee considers this claim to have been sufficiently substantiated, for purposes of admissibility, under articles 7, 9, paragraphs 1 and 4, 10, paragraphs 1 and 3, and 14, paragraph 2, of the Covenant.

Consideration of the merits (*Cases of Messrs. Rameka and Harris*)

7.1 The Human Rights Committee has considered the present communication in the light of all the information made available to it by the parties, as provided in article 5, paragraph 1, of the Optional Protocol.

7.2 The Committee observes at the outset that Mr. Harris would have been subjected, according to the Court of Appeal, to a finite sentence of "not less than" seven and a half years with respect to his offences. Accordingly, Mr. Harris will serve two and a half years of detention, for preventive purposes, before the non-parole period arising under his sentence of preventive detention expires. Given that the State party has demonstrated no case where the Parole Board has acted under its exceptional powers to review *proprio motu* a prisoner's continued detention prior to the expiry of the non-parole period, the Committee finds that, while Mr. Harris' detention for this period of two and a half years is based on the State party's law and is not arbitrary, his inability for that period to challenge the existence, at that time, of substantive justification of his continued detention for preventive reasons is in violation of his right under article 9, paragraph 4, of the Covenant to approach a "court" for a determination of the "lawfulness" of his detention over this period.

7.3 Turning to the issue of the consistency with the Covenant of the sentences of preventive detention of both the remaining authors, Messrs. Rameka and Harris, once the non-parole period of 10 years expires, the Committee observes that after the 10-year period has elapsed, there are compulsory annual reviews by the independent Parole Board, with the power to order the prisoner's release if they are no longer a significant danger to the public, and that the decisions of the Board are subject to judicial review. The Committee considers that the remaining authors' detention for preventive purposes, that is, protection of the public, once a punitive term of imprisonment has been served, must be justified by compelling reasons, reviewable by a judicial authority, that are and remain applicable as long as detention for these purposes continues. The requirement that such continued detention be free from arbitrariness must thus be assured by regular periodic reviews of the individual case by an independent body, in order to determine the continued justification of detention for purposes of protection of the public. The Committee is of the view that the remaining authors have failed to show that the compulsory annual reviews of detention by the Parole Board, the decisions of which are subject to judicial review in the High Court and Court of Appeal, are insufficient to meet this standard. Accordingly, the remaining authors have not demonstrated, at the present time, that the future operation of the sentences they have begun to serve will amount to arbitrary detention, contrary to article 9, once the preventive aspect of their sentences commences.

7.4 Furthermore, in terms of the ability of the Parole Board to act in judicial fashion as a "court" and determine the lawfulness of continued detention under article 9, paragraph 4, of the Covenant, the Committee notes that the remaining authors have not advanced any reasons why the Board, as constituted by the State party's law, should be regarded as insufficiently independent, impartial or deficient in procedure for these purposes. The Committee notes, moreover, that the Parole Board's decision is subject to judicial review in the High Court and Court of Appeal. In the Committee's view, it also follows from the permissibility, in principle, of preventive detention for protective purposes, always provided that the necessary safeguards are available and in fact enjoyed, that detention for this purpose does not offend the presumption of innocence, given that no charge has been laid against the remaining authors which would attract the applicability of article 14, paragraph 2, of the Covenant.[24] As the detention in the remaining authors' cases for preventive purposes is not arbitrary, in terms of article 9, and no suffering going beyond the normal incidents of detention has been suggested, the Committee also finds that the remaining authors have not made out any additional claim under article 10, paragraph 1, that their sentence of preventive detention violates their right as prisoners to be treated with respect for their inherent dignity.

8. The Human Rights Committee, acting under article 5, paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights, is of the view that the facts before it disclose a violation of article 9, paragraph 4, of the Covenant with respect to Mr. Harris.

9. In accordance with article 2, paragraph 3 (a), of the Covenant, the State party is under an obligation to provide Mr. Harris with an effective remedy, including the ability to challenge the justification of his continued detention for preventive purposes once the seven and a half year period of punitive sentence has been served. The State party is under an obligation to avoid similar violations in the future.

10. Bearing in mind that, by becoming a State party to the Optional Protocol, the State party has recognized the competence of the Committee to determine whether there has been a violation of the Covenant or not and that, pursuant to article 2 of the Covenant, the State party has undertaken to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the Covenant, the Committee wishes to receive from the State party, within 90 days, information about the measures taken to give effect to its Views. The State party is also requested to publish the Committee's Views.

[Adopted in English, French and Spanish, the English text being the original version. Subsequently to be issued also in Arabic, Chinese and Russian as part of the present report.]

Notes

[1] Sections 75, 77 and 89 *Criminal Justice* Act 1985 provide as follows:

> Sentence of preventive detention
>
> "(1) This section shall apply to any person who is not less than 21 years of age, and who either
>
> (a) Is convicted of an offence against section 128 (1) [sexual violation] of the Crimes Act 1961; or
>
> (b) Having been previously convicted on at least one occasion since that person attained the age of 17 years of a specified offence, is convicted of another specified offence, being an offence committed after that previous conviction.
>
> (2) Subject to the provisions of this section, the High Court, if it is satisfied that it is expedient for the protection of the public that an offender to whom this section applies should be detained in custody for a substantial period, may pass a sentence of preventive detention. …
>
> (3A) A court shall not impose a sentence of preventive detention on an offender to whom subsection (1) (a) of this section applies unless the court
>
> (c) Has first obtained a psychiatric report on the offender; and
>
> (d) Having regard to that report and any other relevant report,
>
> Is satisfied that there is a substantial risk that the offender will commit a specified offence upon release."

Period of preventive detention indefinite

"An offender who is sentenced to preventive detention shall be detained until released on the direction of the Parole Board in accordance with this Act."

Discretionary release on parole

"(1) Subject to subsection (2) of this section, an offender who is subject to an indeterminate sentence is eligible to be released on parole after the expiry of 10 years of that sentence."

[2] [1998] 1 NZLR 420.

[3] See footnote 1, *supra.*

[4] Cobley: *Sex Offenders: Law, Policy and Practice* (Jordans, Bristol, 2000) at 196; Brown & Pratt: *Dangerous Offenders, Punishment & Social Order* (Routledge, London, 2000) at 82 and 93.

[5] The authors cite *Van Droogenboeck v. Belgium* (1982) 4 EHRR 443 (administrative detention "at the Government's disposal" following a two year sentence for theft) and *Weeks v. United Kingdom* (1988) 10 EHRR 293 (discretionary life sentence for armed robbery with release on licence when no longer a threat).

[6] The authors cite Harris, O'Boyle & Warbrick: *Law of the European Convention on Human Rights* (Butterworth's, London, 1995) at 108-9, 146, 151-152 and 154, and Wachenfeld "The Human Rights of the Mentally Ill in Europe under the European Convention on Human Rights", *Nordic Journal of International Law* 60 (1991) at 174-175.

[7] CCPR/C/79/Add.47; A/50/40, paras. 179 and 186 (3 October 1995).

[8] The offences are (i) if committed against a child under 16, incest (s.130 *Crimes* Act 1961), sexual intercourse with a girl under care or protection (s.131), sexual intercourse with a girl under 12 (s.132), indecency with a girl under 12 (s.133), sexual intercourse or indecency with a girl between 12 and 16 (s.134), indecency with a boy under 12 (s.140), indecency with a boy between 12 and 16 (s.140 A), indecent assault on a man or boy (s.141), performing or attempting anal intercourse on a person under 16 or severely subnormal (s.142), and (ii) sexual violation (s.128), attempt to commit sexual violation (s.129), compelling an indecent act with an animal (s.142 A), attempted murder (s.173), wounding with intent (s.188), injuring with intent to cause grievous bodily harm (s.189 (1)), aggravated wounding or injury (s.191), and throwing of acid with intent to injure or disfigure (s.199).

[9] (1999) 30 EHRR 121.

[10] Application 24724/94.

[11] See paras. 4.20 (Mr. Rameka), 4.24 (Mr. Tarawa), and 4.30 (Mr. Harris), infra.

[12] Case No. 91/1981, decision adopted on 28 October 1981. See also *T. v. United Kingdom*, op. cit.

[13] *R. v. Smith* CA 315/96, 19 December 2002.

[14] CA258/01, judgement of 24 October 2002.

[15] The State party refers, by way of example, to *A. v. New Zealand* case No. 754/1997, Views adopted on 15 July 1999, at para. 7.3.

[16] See para. 4.3, supra.

[17] See, for example, *Hill v. Spain* case No. 526/1993, Views adopted on 2 April 1997.

[18] *R. v. Taito* (2002) 6 HRNZ 539.

[19] Op. cit.

[20] Ibid.

[21] Op. cit.

[22] *R. v. Dittmer*, op. cit.

[23] Op. cit.

[24] See also *Wilson v. The Philippines* case No. 868/1999, Views adopted on 30 October 2003, at para. 6.5.

APPENDIX

Individual opinion of Committee members Mr. Prafullachandra Natwarlal Bhagwati, Ms. Christine Chanet, Mr. Glèlè Ahanhanzo and Mr. Hipólito Solari Yrigoyen (dissenting in part)

In stating, in paragraph 7.2 of its decision, that Mr. Harris' detention is based on the State party's law and is not arbitrary, the Committee proceeds by assertion and not by demonstration.

In our view, the arbitrariness of such detention, even if the detention is lawful, lies in the assessment made of the possibility of the commission of a repeat offence. The science underlying the assessment in question is unsound. How can anyone seriously assert that there is a "20% likelihood" that a person will reoffend?

To our way of thinking, preventive detention based on a forecast made according to such vague criteria is contrary to article 9, paragraph 1, of the Covenant.

However far any checks made when considering parole may go to prevent violations of article 9, paragraph 4, of the Covenant, it is the very principle of detention based solely on potential dangerousness that I challenge, especially as detention of this kind often carries on from, and becomes a mere and, it would not be going too far to say, an "easy" extension of a penalty of imprisonment.

While often presented as precautionary, measures of the kind in question are in reality penalties, and this change of their original nature constitutes a means of circumventing the provisions of articles 14 and 15 of the Covenant.

For the defendant, there is no predictability about preventive detention ordered in such circumstances: the detention may be indefinite. To rely on a prediction of dangerousness is tantamount to replacing presumption of innocence by presumption of guilt.

Paradoxically, a person thought to be dangerous who has not yet committed the offence of which he/she is considered capable is less well protected by the law than an actual offender.

Such a situation is a source of legal uncertainty and a great temptation to judges who may wish to evade the constraints of articles 14 and 15 of the Covenant.

(*Signed*): Prafullachandra Natwarlal Bhagwati

(*Signed*): Christine Chanet

(*Signed*): Maurice Glèlè Ahanhanzo

(*Signed*): Hipólito Solari Yrigoyen

[Adopted in English, French and Spanish, the French text being the original version. Subsequently to be issued also in Arabic, Chinese and Russian as part of the present report.]

Individual opinion of Committee member Mr. Walter Kälin (dissenting in part)

The Committee concludes, in paragraph 7.2 of its Views, that Mr. Harris will serve two and a half years of detention, for preventive purposes, before he can approach the Parole Board after a total of 10 years of detention and that the denial of access to a "court" during this period amounts to a violation of his right under article 9, paragraph 4, of the Covenant. This finding is based on the assumption that Mr. Harris would have been subjected, according to the Court of Appeal, to a finite sentence of "not less" than seven and a half years with respect of his offences. While the Court of Appeal did, indeed, observe that the case would warrant a finite sentence of "not less" than seven and a half years, it did not impose such a finite sentence, but rather substituted a sentence of preventive detention from the outset. Finite sentences are to be proportionate to the seriousness of the crime and the degree of guilt, and they serve multiple purposes, including punishment, rehabilitation and prevention. In contrast, as is clearly spelled out in section 75 of the State party's Criminal Justice Act 1985, preventive detention does not contain any punitive element, but serves the single purpose of protecting the public against an individual in regard to whom the court is satisfied "that there is a substantial risk that [he] will commit a specified offence upon release". Although preventive detention is always triggered by the commission of a serious crime, it is not imposed for what the person concerned did in the past, but rather for what he is, i.e. for being a dangerous person who might commit crimes in the future. While preventive detention for the purpose of protecting the public against dangerous criminals is not prohibited as such under the Covenant and its imposition sometimes cannot be avoided, it must be subject to the strictest procedural safeguards, as provided for in article 9 of the Covenant, including the possibility for periodic review, by a court, of the continuing lawfulness of such detention. Such reviews are necessary as any human person has the potential to change and improve, i.e. to become less dangerous over time (e.g. as a consequence of inner growth or of a successful therapy, or as a result of an ailment reducing his physical abilities to commit a specific category of crimes). In the present circumstances, Mr. Harris did not receive any finite sentence aimed at sanctioning past conduct, but was detained for the sole reason of protection of the public. Therefore, I conclude that his right to "take proceedings before a court, in order that that court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful" (article 9, paragraph 4) was not only violated during the last two and a half years of the first 10 years of preventive detention, but also during that whole initial period. For the same reasons, I would find that the detention over the same initial period of 10 years prior to review by the Parole Board would also be in violation of article 9, paragraph 4, with respect to Mr. Rameka.

(*Signed*): Walter Kälin

[Adopted in English, French and Spanish, the English text being the original version. Subsequently to be issued also in Arabic, Chinese and Russian as part of the present report.]

Individual opinion of Committee member Mr. Rajsoomer Lallah (dissenting)

I am unfortunately unable to join the majority in the Committee in their conclusion that there has been no violation of the Covenant except in the case of Mr. Harris where a violation was found in respect of article 9, paragraph 4, of the Covenant (paragraph 7.2 of the Committee's Views). Nor do I agree, for the reasons explained in paragraph 2 of this separate opinion, that the Committee should have declared the communication admissible only in respect of articles 7, 9, paragraphs 1 and 4, 10, paragraphs 1 and 3, and, finally, 14, paragraph 2, of the Covenant (paragraph 6.5 of the Views), and not articles 14 and 15, paragraph 1.

Admittedly, the authors would appear, from paragraph 1 of the Views, to have mentioned particular provisions of the Covenant. However, under the Optional Protocol, authors need only aver facts and offer submissions and arguments in support of their complaint so that the State party may be given an opportunity to address them. Indeed, many authors have done so in the past. And it is the province of the Committee to consider and determine, in the light of all the information provided by the authors and the State party, which particular provisions of the Covenant are or are not relevant. In any event, in considering the application or interpretation of particular provisions of the Covenant, it may be necessary to consider the impact of other provisions of the Covenant, provided always that both sides have been given the opportunity of addressing the particular facts, submissions or arguments put forward by the other party.

The complaint of the authors covers a number of issues. The most important among these is, in my view, their contention that preventive detention in their case is inconsistent with the Covenant, in particular, in that they were effectively being sentenced and punished for what they might do when released, rather than for what they have done, that is to say, they were being punished for crimes which had not been, and which might never be, committed. This complaint requires, in my view, consideration of the application of articles 14 and, also, 15, paragraph 1, of the Covenant.

With respect, the majority in the Committee would appear to have simply assumed that the "preventive detention" prescribed in New Zealand law expressly as a "sentence" or penalty for certain criminal offences is legitimate under article 9 of the Covenant. Undoubtedly, the provision in the second sentence of article 9, paragraph 1, of the Covenant leaves it to States parties to determine the grounds, and the procedure in accordance with which, a person may be deprived of his liberty.

As the Committee has pointed out as far back as 1982 in general comment No. 8 in relation to article 9 of the Covenant, paragraph 1 of that article is applicable to all deprivations of liberty, whether in criminal cases or such other cases as mental illness, vagrancy, drug addiction, educational purposes and immigration control, etc. However, both the grounds and the procedure required to be prescribed by law under article 9, paragraph 1, must be consistent with the other rights recognized in the Covenant.

It is axiomatic, therefore, that where one of the grounds relied upon is a certain type of conduct, in particular circumstances, which is created into a criminal offence and sanctioned by law by deprivation of liberty, then not only must the particular offence created but its sanction as well must comply with the guarantees provided in article 15, paragraph 1, of the Covenant. In my view, two important features, among others, characterize article 15, paragraph 1. Firstly, a criminal offence relates only to past acts. Secondly, the penalty for that offence can only relate to those past acts. It cannot extend to some future psychological condition which might or might not exist in the offender some 10 years thereafter and which might or might not lead an offender who has already purged the punitive part of his sentence to be exposed to the risk of further detention. Further, the trial for such offences and the sanction to be imposed must also satisfy the requirements of a fair trial guaranteed under article 14 of the Covenant.

Rape is undoubtedly a serious offence and violence against women requires the adoption of all appropriate measures by a State party to deal with the problem, including penalization, which meets the guarantees of articles 14 and 15 of the Covenant, and treatment, reformation and social rehabilitation of offenders which the State party is under an obligation to undertake in pursuance of article 10, paragraph 3, of the Covenant. There is further nothing which would prevent a State party from adopting measures to supervise and effectively monitor, administratively or by the police, the behaviour of past offenders on release, in circumstances where there are reasonable and good grounds for apprehending their reoffending.

Now, according to the information provided by the authors and the State party, it would seem that the minimum period of preventive detention was legislatively fixed at the relevant time to 10 years and has now been reduced to 5 years, but is not subject to a maximum period. This maximum period of detention is thus removed from the jurisdiction of the trial Court and is left to a Parole Board, with the result that the trial Court is legislatively prevented from passing a finite sentence. The State party considers that the legislatively fixed minimum period of 10 years is the punitive part of the sentence, the Parole Board being entrusted with the competence of periodically determining the finality of the sentence, on the reasoning that the sentence becomes preventive and, in principle, without a maximum limit. This in itself would clearly raise a serious question of proportionality.

I note that the material before the Committee indicates that the detention following the so-called punitive period continues in prison. In these circumstances, the "punitive" and "preventive" parts of the sentence become, in reality, a distinction without a difference. When stripped of the colourable statutory device which purportedly confers power to sentence on the trial Court, the reality is that, in substance and in practice, it is only part of the sentence which is left to the trial Court (and that too at a legislatively fixed minimum over which the trial Court has no control or discretion). The rest of the sentence is left in the hands of an administrative body, without the due process guarantees of article 14. There is of course nothing wrong in legal measures enabling early release, but enabling an administrative body to determine in effect the duration of the sentence beyond the statutory minimum is another matter.

I would thus conclude as follows:

(i) While it is legitimate to consider past conduct, good or bad, as a relevant factor in determining sentence, a violation of article 15, paragraph 1, of the Covenant has occurred, because that article only permits the criminalization and sanctioning, by law, of past acts but not acts which it is feared might occur in the future;

(ii) A violation of article 15, paragraph 1, has occurred, also because the law does not prescribe a finite sentence to be imposed by the trial Court;

(iii) A violation of article 14, paragraph 1, has occurred in that a fair trial requires that the Court before which a trial is conducted must have the jurisdiction to pass a definitive sentence and not one that is legislatively fixed to a minimum of years. Furthermore, the law of the State party, in effect, delegates this jurisdiction to an administrative body which will determine the length of the sentence at some time in the future, without the due process guarantees prescribed under article 14 of the Covenant;

(iv) A violation of article 14, paragraph 2, has also occurred because an anticipatory assessment of what may happen after a lapse of 10 years or so, even before the benefits of treatment, reformation and social rehabilitation required under article 10, paragraph 3, of the Covenant have taken place, could not conceivably meet the essential burden of proof required. In this regard, though relevant in determining sentence, even previous convictions concerning past criminal conduct require to be proved beyond reasonable doubt where these are disputed by the person accused;

(v) It is not correct, therefore, to find a violation of article 9, paragraph 4, of the Covenant, as it is inapplicable in the light of the above approach. If a finding of a violation of article 9 is at all necessary, then it would be article 9, paragraph 1, because the State party has failed to construe it in the light of other applicable provisions of the Covenant, in particular articles 14 and 15 of the Covenant. But a violation of these latter articles or relevant provisions of those articles has already been found.

(*Signed*): Rajsoomer Lallah

[Adopted in English, French and Spanish, the English text being the original version. Subsequently to be issued also in Arabic, Chinese and Russian as part of the present report.]

Individual opinion of Committee members Mr. Shearer and Mr. Roman Wieruszewski, in which Committee member Mr. Nisuke Ando joins (dissenting in part)

In our view, the reasons for deciding that the State party is not in violation of the Covenant in respect of the sentence of preventive detention imposed on Mr. Rameka, with which we agree, apply equally to the case of Mr. Harris. The ground of distinction between the cases of the two remaining authors, drawn by the Committee, is that in the case of Mr. Rameka a finite sentence of 14 years' imprisonment was imposed on one count of the indictment to be served concurrently with the sentence of preventive detention imposed on another count. In the case of Mr. Harris, the concurrent finite sentence would have been seven and a half years, had the Court of Appeal not decided that a sentence of preventive detention was justified for the protection of the community thus leaving a gap of two and a half years between the expiry of that potential sentence and the end of the non-parole period of the sentence of preventive detention (at 10 years).

The author himself did not advance any argument before the Committee based upon an actual or hypothetical non-review "gap" period.

It is not appropriate, in our opinion, to separate indefinite preventive detention into punitive and preventive segments. Unlike finite sentences, which are based on the traditional purposes of imprisonment - to punish and to reform the offender, to deter the offender and others from future offending, and to vindicate the victim and the community - sentences of preventive detention are designed solely to protect the community against future dangerous conduct by an offender in respect of whom past finite sentences have manifestly failed to achieve their aims.

Under the State party's law applicable to the authors a sentence of preventive detention runs for 10 years before the sentence may be reviewed by the Parole Board (whose decisions are subject to judicial review). As a result of a recent amendment to that law, the non-review period has been shortened to five years. Even the longer period cannot be regarded as arbitrary or unreasonable in the light of the conditions governing the imposition of such a sentence. We consider that the State party's law in respect of preventive detention cannot be regarded as contrary to the Covenant. In particular, article 9, paragraph 4, of the Covenant cannot be construed so as to give a right to judicial review of a sentence on an unlimited number of occasions.

(*Signed*): Ivan Shearer

(*Signed*): Roman Wieruszewski

[Adopted in English, French and Spanish, the English text being the original version. Subsequently to be issued also in Arabic, Chinese and Russian as part of the present report.]

Individual opinion of Committee member Mr. Nisuke Ando (dissenting in part)

I concur fully with the opinion of Messrs. Shearer and Wieruszewski. Moreover, I would like to add the following:

The majority Views seem to find a violation of article 9, paragraph 4, in the case of Mr. Harris on the assumption that the period of imprisonment under the relevant New Zealand law should be divided into a punitive detention part, which consists of a definite or fixed time period (non-parole period) and a preventive detention part, which consists of indefinite or flexible time period. In my view, this assumption of a division is artificial and not valid.

In many other States parties to the Covenant, domestic courts often sentence a convict to imprisonment for a flexible time period (e.g. 5 to 10 years) so that, while he/she must be imprisoned for the shorter time period (5 years), he/she can be released before the longer time period (10 years) depending on his/her conditions of improvement or amelioration. In substance, this sentencing of imprisonment for a flexible period of time is comparable to the regime of preventive detention under the New Zealand law.

The term "preventive detention" may give an impression that it is primarily detention of administrative nature as opposed to detention of judicial nature. However, the Committee should look into not the name but the substance of any institution of law of a State party in determining its legal character. In other words, if the Committee considers the sentencing of imprisonment for a flexible period of time to be compatible with the Covenant, there is no reason why it should not do the same with preventive detention under the New Zealand law. In fact, article 31, paragraph 2, of the Covenant requires that the Committee should represent "the principal legal systems" of the world.

(*Signed*): Nisuke Ando

[Adopted in English, French and Spanish, the English text being the original version. Subsequently to be issued also in Arabic, Chinese and Russian as part of the present report.]

GG. Communication No. 1096/2002, *Kurbanova v. Tajikistan* (Views adopted on 6 November 2003, seventy-ninth session)*

Submitted by:	Mrs. Safarmo Kurbanova (not represented by counsel)
Alleged victim:	The author's son, Mr. Abduali Ismatovich Kurbanov
State party:	Tajikistan
Date of communication:	16 July 2002 (initial submission)

The Human Rights Committee, established under article 28 of the International Covenant on Civil and Political Rights,

Meeting on 6 November 2003,

Having concluded its consideration of communication No. 1096/2002, submitted to the Human Rights Committee by Safarmo Kurbanova on behalf of her son Abduali Ismatovich Kurbanov under the Optional Protocol to the International Covenant on Civil and Political Rights,

Having taken into account all written information made available to it by the author of the communication, and the State party,

Adopts the following:

Views under article 5, paragraph 4, of the Optional Protocol

1.1 The author of the communication is Mrs. Safarmo Kurbanova, a Tajik citizen born in 1929. She submits the communication on behalf of her son - Abduali Ismatovich Kurbanov, also a Tajik citizen, born in 1960 and sentenced to death on 2 November 2001 by the Military Chamber of the Supreme Court of Tajikistan. He is at present awaiting execution in the Detention Centre No. 1 in Dushanbe. The author claims that her son is a victim of violations by Tajikistan[1] of articles 6, 7, 9 and 10, as well as paragraphs 1, 3 (a) and (g), and 5 of article 14 of the International Covenant on Civil and Political Rights. The communication also appears to raise issues under article 14, paragraph 3 (d), of the Covenant, although this provision is not directly invoked. The author is not represented by counsel.

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* The following members of the Committee participated in the examination of the present communication: Mr. Nisuke Ando, Mr. Prafullachandra Natwarlal Bhagwati, Mr. Alfredo Castillero Hoyos, Ms. Christine Chanet, Mr. Franco Depasquale, Mr. Maurice Glèlè Ahanhanzo, Mr. Walter Kälin, Mr. Ahmed Tawfik Khalil, Mr. Rajsoomer Lallah, Mr. Rafael Rivas Posada, Sir Nigel Rodley, Mr. Ivan Shearer, Mr. Hipólito Solari Yrigoyen, Mr. Roman Wieruszewski and Mr. Maxwell Yalden.

1.2 On 16 July 2002, in accordance with rule 86 of its rules of procedure, the Human Rights Committee, acting through its Special Rapporteur on new communications, requested the State party not to carry out the death sentence of Mr. Kurbanov while his case is pending before the Committee. No reply has been received from the State party in this regard.

The facts as presented by the author

2.1 According to the author, Mr. Kurbanov went to the police on 5 May 2001 to testify as a witness. He was detained for seven days in the building of the Criminal Investigation Department of the Ministry of the Interior, where according to the author he was tortured. Only on 12 May 2001, a formal criminal charge of fraud was made against him, an arrest warrant was issued for him, and he was transferred to an investigation detention centre. He was forced to sign a declaration that he renounced the assistance of a lawyer.

2.2 On 9 June 2001, a criminal investigation was opened in relation to the triple murder of Firuz and Fayz Ashurov and D. Ortikov, which had occurred in Dushanbe on 29 April 2001. In addition to the initial fraud charge, the author's son was, on 30 July 2001, charged with the murders and with illegal possession of firearms.[2] The author claims that her son was tortured before he accepted to write down his confession under duress; during her visits, she noted scars on her son's neck and head, as well as broken ribs. She adds that one of the torturers - investigation officer Rakhimov - was charged in August 2001 with having received bribes and with abuse of power in 13 other cases also related to the use of torture; he was later sentenced to 5 years and 6 months of imprisonment.

2.3 The investigation was concluded on 4 August 2001, and the case was sent to court. On 2 November 2001, the Military Chamber of the Supreme Court sentenced the author's son to death (with confiscation of his property). On 18 December 2001 the judgement was confirmed by the Supreme Court, following extraordinary appeal proceedings.

2.4 The judgement of 2 November 2001 by the Military Chamber of the Supreme Court was submitted to the Committee by the author in Tajik; an unofficial English translation was provided subsequently. The judgement includes neither an account of the prosecution's case nor a transcript of the actual trial. It begins with a description of the facts as established by the court, then moves to the testimonies of the three accused persons and some witnesses, and finally addresses the issues of the conviction and sentencing. It does not transpire from this judgement how the Military Chamber of the Supreme Court was constituted, e.g. whether one or more of its judges were military officers. However, it transpires that Mr. Kurbanov was tried together with one Mr. Ismoil and Mr. Nazmudinov, who was a major in the service of the Ministry of National Security. According to the facts established by the court, Mr. Kurbanov killed, on 29 April 2001, three persons in the car of one of the victims, using an unregistered pistol. Later, he hid the bodies by burying them in the immediate vicinity of his garage and left the pistol with Mr. Ismoil, after telling him that he had killed three persons. On 8 May 2001, Mr. Ismoil delivered the pistol to Mr. Nazmedinov who in turn failed to deliver it to the authorities. Instead, the gun was found on 12 June 2001 in Mr. Nazmedinov's apartment.

2.5 According to the same judgement, Mr. Kurbanov confessed to the killings and admitted to burying his own clothes and the car's licence plate together with the bodies. Neither the two co-accused nor any of the witnesses heard by the court testified they had seen Kurbanov commit the killings. One witness, Mr. Hamid, testified that he learned on 5 May 2001 that Kurbanov had been detained for fraud and that he had later on directed the investigators to the site where Kurbanov was building a garage. The judgement refers to Hamid saying that "he was present when the three bodies of the dead were dug out from the pit of the garage and found out that the murderer was Kurbanov". Another witness, Mr. Mizrobov, testified that he was present on 5 May 2001 when Kurbanov was taken to the authorities. He was also present on 8 or 9 June 2001 when the bodies of the three victims, "Kurbanov's clothes" and the car licence plate were found. The judgement mentions that there was ballistic evidence linking the pistol found on 12 June 2001 in Mr. Nazmedinov's apartment to the crime. However, no forensic evidence linking Mr. Kurbanov to the clothes found with the bodies is mentioned, and only the confessions of the three co-defendants linked Mr. Kurbanov to the gun.

2.6 At the end of the trial, Mr. Kurbanov was sentenced to death and confiscation of his property, whereas Mr. Ismoil and Mr. Nazmedinov were both sentenced to four years' imprisonment, on account of their involvement with the crime weapon, and then immediately pardoned and released by the same court.

The claim

3.1 The author claims that her son was detained for seven days without arrest warrant. During this time, he was unable to see his family or a lawyer. The fact that her son was illegally arrested and detained for one week without being promptly informed of the charges against him, constitutes, according to the author, a violation of article 9, paragraphs 1 and 2, of the Covenant.

3.2 Article 7 and article 14, paragraph 3 (g), of the Covenant are said to be violated as Mr. Kurbanov allegedly was subjected to torture and beatings by means of kicks and with batons, strangulation, torture with electricity during the investigation, to make him confess. During a pre-trial cross-examination with the father of one of the murder victims - Mr. Ortikov - the author's son was beaten by the father in the presence of the investigators.

3.3 The author contends that article 14, paragraph 1, of the Covenant was violated, as the court proceedings were partial. She alleges that the court proceedings were unfair from the beginning, as the families of the victims exercised pressure on the judges. All requests of the defence were rejected.

3.4 The author claims that when her son was charged with murder, she requested, due to her financial situation, a lawyer be assigned to him ex officio, but she was informed that the law provided no such possibility.

3.5 The author also claims that according to the case file, a lawyer assisted her son as of 20 June 2001, but in fact she hired a lawyer for her son only in July 2001. She adds that the lawyer visited her son only two or three times during the investigation, and this was always in the presence of an investigator. After the judgement, her son was unable to see the lawyer and benefit from his assistance. According to the author, the lawyer failed to appeal for cassation. Her son had no opportunity to consult the court's judgement, as no interpreter was provided to him. Mr. Kurbanov prepared a cassation appeal himself, but this was denied, because the deadline for filing the appeal had passed. The author's own cassation appeal was denied on the ground that she was not a party to the criminal case. The extraordinary appeal proceedings which her son availed himself of with the assistance of his lawyer were unsuccessful; they do not, according to the author, provide an effective means of judicial protection. Article 14, paragraph 5, of the Covenant allegedly was violated because the author's son was deprived of his right to appeal.

3.6 During the investigation, the author's son was not assisted by an interpreter, nor was he offered a qualified interpreter during the trial, despite the fact that he is a Russian speaker and some of the court documents were in Tajik. This is said to be in violation of article 14, paragraph 3 (f), of the Covenant.

3.7 The author's son is said to be detained in inhuman conditions. The cells have no water; toilets are in a corner of the cells, but they cannot be used because of the lack of water. In winter, the cells are very cold, and in summer extremely hot. Air circulation is limited because of the tiny size of the cells and of the windows. They are infested with insects because of the lack of hygiene. Prisoners are allowed to leave their cell for a walk only for half an hour per day. These conditions are said to amount to a violation of article 10 of the Covenant.

3.8 Finally, the author claims that her son's right to life protected by article 6, paragraphs 1 and 2, was violated, because the violations of article 14 resulted in an illegal and unfair death sentence, which was pronounced by an incompetent tribunal.

State party's submissions on the admissibility and merits

4.1 By note verbale of 16 September 2002, the State party observes that pursuant to information from the Governmental Commission on implementation of the international obligations of Tajikistan in the field of human rights, Mr. Kurbanov was sentenced to death by the Military Chamber of the Supreme Court on 2 November 2001. The criminal proceedings against the author's son were initiated on 12 May 2001. He was ordered arrested on the same day, and he signed a written statement that he did not need legal representation during the preliminary investigation.

4.2 The State party contends that on 29 April 2001, Mr. Kurbanov killed three persons, and that on 9 June 2001 a criminal investigation was opened in this regard. The State party points out that Mr. Kurbanov provided a written and full confession of his guilt, and explained the circumstances of the crime in the presence of the lawyer, Mr. Nizomov. In the State party's view, the author's allegations about the use of illegal methods of interrogation including violence and torture against her son should be considered unsubstantiated, as neither during the investigation nor in court, were such allegations raised by Mr. Kurbanov.

4.3 The State party also dismisses as unsubstantiated the author's contention that her son was not provided with an interpreter during the investigation and during the court proceedings. Mr. Kurbanov is Tajik, and upon closure of the investigation, when he consulted the case file, he declared that he did not need an interpreter. Court proceedings were conducted in the presence and with the participation of an interpreter.

4.4 The State party finally observes that the Supreme Court noted that in his cassation appeal, the author's son did not challenge the judgement of the court nor the actions of the court and the investigators, but asked for commutation of the death sentence to a long prison term. The State party concludes that on the basis of its investigations into the case, no violations of the Covenant occurred.

Author's comments on State party's submission

5.1 By letters of 25 November 2002, 13 January, 27 March, and 21 July 2003, the author presented further information. She reaffirms that her son was arrested on 5 May 2001 at around 3 p.m. when he voluntarily went to the police to testify as a witness. On 7 May, the author complained in writing to the Office of the Prosecutor-General; that same day, officers from that Office went to the Ministry of the Interior, to enquire about the whereabouts of her son. They were unable to find him because, as he had been beaten and was covered with blood, he was hidden in a locked office, in the presence of the policeman who had beaten him.

5.2 The author notes that the State party's submission includes copies of interrogation record sheets, with a specific field reserved for the need for interpretation, where it is mentioned that Mr. Kurbanov does not need interpretation, and that he would make his deposition in Russian. For the author, this proves that her son's mother tongue is Russian. The investigation was conducted in Russian. Some of the proceedings, such as cross examination, were however held in Tajik; in spite of her son's request for interpretation, the investigator refused to provide for it, explaining that Mr. Kurbanov was a Tajik national and was presumed to be proficient in Tajik. The trial was also held in Tajik. Some of the hearings benefited from interpretation, but according to the author, the interpreter was unqualified, and it was often difficult to understand him.

5.3 As to the authenticity of her son's written confession, the author states that her son does not deny the authenticity of his signature on the record sheets, but that he claims to have signed them under torture. The author reiterates that her son bears marks of torture on his body, and that this was brought to the attention of the State party on several occasions.

5.4 As Mr. Kurbanov was provided with the services of a lawyer only on 23 July 2001, all proceedings during this period (including interrogations), were conducted without any legal representation. This facilitated the torture of her son, and he could not complain, inter alia, because he did not know to whom to complain.

5.5 The author reiterates that upon his arrest, her son was not promptly informed of the reasons for his arrest, nor later, of the sentence he risked for the crime he had been charged with.

5.6 Between 5 and 12 May 2001, the author's son was detained in the building of the Criminal Investigation Department and was prevented from receiving food and items brought to him.

5.7 Regarding the State party's argument that Mr. Kurbanov is Tajik and should be presumed to master Tajik the author notes that her son speaks only basic Tajik because his schooling was in Russian, moreover he had lived in Russia for a long time. He is not in a position to understand legal terminology and literary phrases in Tajik. For that reason he could not understand the charges or the sentence during the court procedures.

5.8 The author acknowledges that no specific complaint about the use of torture was made, but affirms that this allegation was raised in court and was also conveyed to numerous governmental and non-governmental organizations. Thus, in the author's opinion, the authorities were fully aware of the allegations relating to her son's torture. Yet, no inquiry was initiated.

5.9 The author reiterates that the entire investigation in her son's case was partial and not objective. The case file initially contained a complaint about fraud from the wife of one Khaidar Komilov. The investigators, however, removed all reference to that person at a latter stage, calling him the "unknown Khaidar". According to the author, by doing so, the investigators eliminated from the proceedings a potentially important witness.

5.10 In her letter of 21 July 2003, the author submits that because of the anguish arising out of the prospect of his execution, her son's psychological condition has deteriorated significantly.

Issues and proceedings before the Committee

Decision on admissibility

6.1 Before considering any claims contained in a communication, the Human Rights Committee must, in accordance with rule 87 of its rules of procedure, decide whether or not it is admissible under the Optional Protocol to the Covenant.

6.2 The Committee has ascertained that the same matter is not being examined under another procedure of international investigation or settlement for purposes of article 5, paragraph 2 (a), of the Optional Protocol.

6.3 With regard to the requirement of exhaustion of domestic remedies, the Committee notes that although the author failed to file a normal appeal after conviction, his case was nevertheless reviewed through extraordinary appeal by the Supreme Court and that the State party has not challenged the admissibility of the communication on this ground. It therefore considers that the author has met the requirements of article 5, paragraph 2 (b), of the Optional Protocol.

6.4 With regard to the author's allegation under article 14, paragraph 1, that the trial was partial due to the pressure exerted by the audience, the Committee considers that the author has not substantiated this claim, for the purposes of admissibility. Hence, this part of the communication is inadmissible under article 2 of the Optional Protocol.

6.5 As to the author's claims that her son was denied the assistance of a lawyer during the pre-trial investigation and that even at later stages the assistance of his lawyer remained limited, the Committee notes that these allegations could raise issues under article 14, paragraph 3 (b) and (d), and recalls its jurisprudence that, particularly in cases involving capital punishment, it is axiomatic that the accused is effectively assisted by a lawyer[3] at all stages of the proceedings. However, the Committee notes that the author's son was assisted by a privately hired lawyer from 23 July 2001 onwards, including the actual trial and the extraordinary appeal procedure, and that the author has not given any date for the so-called cross-examination arranged as a part of the pre-trial investigation. Furthermore, the Committee notes that although the author might have been suspected of the murders since the discovery of the bodies, he was informed of his status as a suspect on 11 June 2001 and formally charged with the murders on 30 July 2001, i.e. at a time when he already was assisted by a lawyer. Even though the Committee will have to address on the merits the conduct of the State party's authorities under article 9, paragraph 2, and article 14, paragraph 3 (a), it considers in the circumstances, that no issue under article 14, paragraph 3 (b) and (d), has been substantiated, for the purposes of admissibility.

6.6 Similarly, the Committee considers that the author has not substantiated, for purposes of admissibility, that article 14, paragraph 3 (f), was violated due to the limitations on, and the insufficient quality of, interpretation provided to her son. Noting, in particular, that the presence of an interpreter appears from the judgement of 2 November 2001, the Committee concludes that this claim is inadmissible under article 2 of the Optional Protocol.

6.7 As to the author's claim that her son was denied the right of appeal, the Committee notes that Mr. Kurbanov was represented by privately obtained counsel, who did not file a regular cassation appeal. It is not clear why this was not done, but as a result, Mr. Kurbanov's conviction could only be reviewed by way of an extraordinary appeal. In these particular circumstances, the Committee considers that although the review might have been more limited than in normal appeal proceedings, the author has failed to substantiate, for purposes of admissibility, her claim under article 14, paragraph 5. Accordingly, this part of the communication is inadmissible under article 2 of the Optional Protocol.

6.8 The Committee considers that the remainder of the author's claims have been sufficiently substantiated for purposes of admissibility, and proceeds to their examination on the merits.

Examination of the merits

7.1 The Human Rights Committee has considered the present communication in the light of all the information made available to it by the parties, as required under article 5, paragraph 1, of the Optional Protocol.

7.2 The Committee has taken note of the author's claim that her son was detained on a Saturday (5 May 2001), and detained for seven days without a charge. To support her claim, she provides a copy of the police register which displays a record entered on 7 May 2001 relating to her son's arrest, allegedly for fraud. She filed a complaint about the allegedly illegal detention of her son with the Office of the Procurator General on the same day. Furthermore, the Committee notes that according to the judgement of 2 November 2001 by the Military Chamber of the Supreme Court, the author was detained on 5 May 2001. This information is not refuted by the State party's contention that an arrest warrant was issued on 12 May 2001. In the absence of any further explanations from the State party, the Committee concludes that Mr. Kurbanov was detained for seven days without an arrest warrant and without being brought before a judge. The Committee concludes that his rights under article 9, paragraphs 2 and 3, of the Covenant have been violated.

7.3. Furthermore, the documents submitted by the State party show that Mr. Kurbanov was, after being detained since 5 May 2001 on other grounds, informed on 11 June 2001 that he was suspected of the killings of 29 April 2001 but charged with these crimes only on 30 July 2001. During his detention from 5 May 2001 onwards, he was, except for the last week starting on 23 July 2001, without the assistance of a lawyer. The Committee takes the view that the delay in presenting the charges to the detained author and in securing him legal assistance affected the possibilities of Mr. Kurbanov to defend himself, in a manner that constitutes a violation of article 14, paragraph 3 (a), of the Covenant.

7.4 The Committee has noted the author's fairly detailed description of beatings and other ill-treatment that her son was subjected to. She has furthermore identified by name some of the individuals alleged to have been responsible for her son's ill-treatment. In reply, the State party has confined itself to stating that these allegations were neither raised during the investigation nor in court. The Committee recalls,[4] with regard to the burden of proof, that this cannot rest alone with the author of a communication, especially considering that the author and the State party do not always have equal access to evidence and that frequently the State party alone has access to relevant information. Further, the mere fact that no allegation of torture was made in the domestic appeal proceedings cannot as such be held against the alleged victim if it is proposed, as in the present case, that such an allegation was in fact made during the actual trial but was neither recorded nor acted upon. In the light of the details given by the author on the alleged ill-treatment, the unavailability of a trial transcript and the absence of any further explanations from the State party, due weight must be given to the author's allegations. Noting in particular that the State party has failed to investigate the author's allegations, which were brought to the State party's authorities' attention, the Committee considers that the facts as submitted disclose a violation of article 7 of the Covenant.

7.5 In the light of the above finding and the fact that the author's conviction was based on his confession obtained under duress, the Committee concludes that there was also a violation of article 14, paragraph 3 (g), of the Covenant.

7.6 As to the author's claim that her son's rights under article 14, paragraph 1, were violated through a death sentence pronounced by an incompetent tribunal, the Committee notes that the State party has neither addressed this claim nor provided any explanation as to why the trial was conducted, at first instance, by the Military Chamber of the Supreme Court. In the absence of any information by the State party to justify a trial before a military court, the Committee considers that the trial and death sentence against the author's son, who is a civilian, did not meet the requirements of article 14, paragraph 1.

7.7 The Committee recalls[5] that the imposition of a sentence of death upon conclusion of a trial in which the provisions of the Covenant have not been respected constitutes a violation of article 6 of the Covenant. In the current case, the sentence of death was passed in violation of the right to a fair trial as set out in article 14 of the Covenant, and thus also in breach of article 6.

7.8 The State party has not provided any explanations in response to the author's fairly detailed allegations of the author's son's condition of detention after conviction being in breach of article 10 of the Covenant. In the absence of any explanation from the State party, due weight must be given to the author's allegations according to which her son's cell has no water, is very cold in the winter and hot in the summer, has inadequate ventilation and is infested with insects, and that the author's son is allowed to leave his cell only for half an hour a day. With reference to the United Nations Standard Minimum Rules for the Treatment of Prisoners, the Committee finds that the conditions as described amount to a violation of article 10, paragraph 1, in respect of the author's son.

8. The Human Rights Committee, acting under article 5, paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights, is of the view that the facts before it disclose a violation of the rights of Mr. Kurbanov under article 7, article 9, paragraphs 2 and 3, article 10, article 14, paragraph 1 and paragraph 3 (a) and (g), and of article 6 of the Covenant.

9. Under article 2, paragraph 3 (a), of the Covenant, the author's son is entitled to an effective remedy entailing compensation and a new trial before an ordinary court and with all the guarantees of article 14, or, should this not be possible, release. The State party is under an obligation to take measures to prevent similar violations in the future.

10. Bearing in mind that, by becoming a party to the Optional Protocol, the State party has recognized the competence of the Committee to determine whether there has been a violation of the Covenant or not and that, pursuant to article 2 of the Covenant, the State party has undertaken to ensure to all individuals within its territory or subject to its jurisdiction the rights recognized in the Covenant and to provide an effective and enforceable remedy in case a violation has been established, the Committee wishes to receive from the State party, within 90 days, information about the measures taken to give effect to these Views. The State party is also requested to publish the Committee's Views.

[Adopted in English, French and Spanish, the English text being the original version. Subsequently to be issued also in Arabic, Chinese and Russian as part of the present report.]

Notes

[1] The Optional Protocol entered into force for Tajikistan on 4 April 1999.

[2] It transpires from documents later submitted by the State party that the author's son was on 11 June 2001 initially informed that he was suspected of the murders.

[3] See for example *Aliev v. Ukraine*, communication No. 781/1997, *Robinson v. Jamaica*, communication No. 223/1987 and *Brown v. Jamaica*, communication No. 775/1997.

[4] See, for example, communication No. 161/1983, *Rubio v. Colombia.*

[5] See *Conroy Levy v. Jamaica*, communication No. 719/1996, and *Clarence Marshall v. Jamaica*, communication No. 730/1996.

HH. Communication No. 1117/2002, *Khomidov v. Tajikistan* (Views adopted on 29 July 2004, eighty-first session)*

Submitted by:	Mrs. Saodat Khomidova (not represented by counsel)
Alleged victim:	Mr. Bakhrom Khomidov (author's son)
State party:	Tajikistan
Date of initial communication:	17 September 2002 (initial submission)

The Human Rights Committee, established under article 28 of the International Covenant on Civil and Political Rights,

Meeting on 29 July 2004,

Having concluded its consideration of communication No. 1117/2002, submitted to the Human Rights Committee on behalf of Mr. Bakhrom Khomidov, under the Optional Protocol to the International Covenant on Civil and Political Rights,

Having taken into account all written information made available to it by the author of the communication,

Adopts the following:

Views under article 5, paragraph 4, of the Optional Protocol

1.1 The author of the communication dated 17 September 2002 is Mrs. Saodat Khomidova, a Tajik national. She submits the communication on behalf of her son, Bakhrom Khomidov, a Tajik citizen born in 1968, at present detained on death row in Dushanbe, after being sentenced to death by the Criminal Chamber of the Supreme Court on 12 September 2001. She claims that her son is a victim of violations by Tajikistan of articles 6, paragraphs 1 and 2; 7, 9, and 14, paragraphs 1, and 3 (b) and (g), of the International Covenant on Civil and Political Rights. The communication also appears to raise issues under article 14, paragraph 3 (e) of the Covenant, although this provision is not directly invoked. She is not represented by a counsel.

1.2 On 27 September 2002, the Human Rights Committee, acting through its Special Rapporteur on new communications and interim measures requested the State party not to carry out the death sentence against Mr. Khomidov while his case was under consideration by the Committee. No reply was received from the State party in this respect.[1]

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* The following members of the Committee participated in the examination of the present communication: Mr. Abdelfattah Amor, Mr. Nisuke Ando, Mr. Prafullachandra Natwarlal Bhagwati, Mr. Franco Depasquale, Mr. Maurice Glèlè Ahanhanzo, Mr. Walter Kälin, Mr. Ahmed Tawfik Khalil, Mr. Rajsoomer Lallah, Mr. Rafael Rivas Posada, Sir Nigel Rodley, Mr. Martin Scheinin, Mr. Ivan Shearer, Mr. Hipólito Solari Yrigoyen, Ms. Ruth Wedgwood, Mr. Roman Wieruszewski and Mr. Maxwell Yalden.

Facts as submitted by the author

2.1 In the night of 26 to 27 February 2000, the author's neighbours, Mr. and Mrs. Pirnozarov, were shot dead at their domicile. On 25 May 2000, the author's son was arrested near his mother's house in Dushanbe, allegedly without explaining to him the reasons for his arrest. The police are said to have been assisted by friends and relatives of Mr. and Mrs. Pirnozarov.

2.2 Mr. Khomidov's family was not informed of the arrest. His relatives unsuccessfully tried to locate him; they only learned that he was arrested by the police in relation to the murder 10 days later. Mr. Khomidov allegedly was charged with murder one month after his arrest.

2.3 Allegedly, Mr. Khomidov was detained for four months in three different district police offices as police wanted to force him to confess guilt in several other crimes. The conditions of detention in these facilities allegedly were totally inadequate for long periods of detention. No relative was able to see him until his transfer to the investigation detention centre in October 2000. The visits took place always in the immediate presence of the investigators or personnel of the detention centre.

2.4 After the arrest, no lawyer was assigned to the author's son; he was not informed of his right to be represented by a lawyer. Only after two months was he provided with a lawyer chosen by the investigators. According to the author, this lawyer was incompetent and worked in the interest of the prosecution, without consulting the family on the progress of the investigation. The consultations between the lawyer and the author's son always took place in presence of the investigators.

2.5 The author contends that her son was tortured with electric shocks and was beaten throughout the investigation, forcing him to sign written confessions prepared by the investigators in advance; the majority of these confessions were signed in the absence of a lawyer. The author provides the names of the prosecution officials who she claims tortured her son. She claims that her son was beaten with batons, and parts of his body were electrocuted with a metal bar, causing head and ribs injuries. She also affirms that her son showed her his crooked fingers, a consequence of the torture used.

2.6 Mr. Khomidov was accused of being a member of a criminal gang, headed by one N.I., specialized in robbery. The author's son was charged with 10 acts of robbery and allegedly was the only member of the group to be prosecuted (five other suspected members of the gang were killed in a police action in May 2000); he was also charged with the assault of a driver and the hijacking of his car; he was further accused of illegal possession and storage of firearms and of participation in an attack against governmental troops, and an attempt to blow up the house of a police inspector. Mr. Khomidov was put under psychological pressure also because the family of Mr. and Mrs. Pirnazarov, supported by the police, had set fire to his house and forced his wife and children to leave the premises, while the police illegally confiscated his car and the furniture of his house. His father's mill was destroyed and his animals were taken away; his father was beaten with a rifle butt. Mr. Khomidov allegedly was kept informed of these incidents by the police in order to put him under additional pressure.

2.7 The author further claims that much of the investigation proceedings were conducted in the lawyer's absence, thus making the evidence obtained illegal and inadmissible.

2.8 The Supreme Court judge, S.K., allegedly acted in an accusatory manner. Mr. Khomidov's lawyer's requests were denied, particularly when he asked to call supplementary witnesses, and when he requested that a medical expert examine him to clarify whether he had sustained injuries as a result of the torture he was subjected to. The only witness of the crime was the 5-year old daughter of the neighbours, and she was the only one who identified Mr. Khomidov as the culprit. According to the author, the child's testimony was the consequence of the police "preparation" she was subjected to. As to the episode related to the hijacking of a car, the author alleges that the eyewitnesses could not recognize her son during an identification parade and in court.

2.9 On 12 September 2001, the Supreme Court found Mr. Khomidov guilty of all the charges against him and sentenced him to death. According to the author, the death penalty was imposed on her son because the judge was afraid of eventual persecution against her by the victims' family. On 13 November 2001, on appeal, the Criminal College of the Supreme Court upheld the decision. On 3 October 2002, the President of Tajikistan refused to grant her son a pardon.

2.10 The author adds that according to her son, in August 2002, several investigators visited him on death row and asked him to confess guilt in other unsolved crimes dating back four to five years, including the killing of some Members of Parliament. He was apparently told that since he was sentenced to death, confessing to one or two more crimes would not change his situation.

2.11 On 26 January 2004, the author requested the Committee to reiterate its request for interim measures for protection, as she had received unofficial information that her son's execution had been scheduled for early February.

2.12 On 31 March 2004, she informed the Committee that she met her son on 27 March, and that she had found him in bad health and bad psychological condition. He was very nervous, shouted throughout the meeting, and stated that he could no longer live in such uncertainty and preferred to be executed. He allegedly threatened to commit suicide. According to her, he also had skin problems (permanent itch), a "tumor" in the thorax, and other health problems, but he received no medical assistance or examination.

2.13 The author reiterates that investigators requested her son to confess guilt in other crimes. She alleges that her son was beaten by investigators, as he displayed marks and his face was scratched. She filed no complaint with the authorities in this respect, as she was afraid that they would further harm her son or would execute him.

The claim

3.1 The author claims that her son's rights under article 7 of the Covenant were violated, as he was beaten and subjected to torture in detention.

3.2 Article 9, paragraphs 1 and 2, are said to have been violated, as Mr. Khomidov was detained illegally, for a long period of time, without being informed of any of the charges against him.

3.3 Article 14, paragraph 1, of the Covenant is said to have been violated, as the court did not observe its obligation of impartiality and independence. In this context, the author's claim that the judge, under pressure from the relatives of the murder victims, refused to order a medical examination to ascertain whether Mr. Khomidov's injuries resulted from torture or to call witnesses on his behalf, while not specifically invoked, may raise issues under article 14, paragraph 3 (e), of the Covenant.

3.4 The author claims a violation of article 14, paragraph 3 (b), as her son was not allowed sufficient time to prepare his defence, and because he was not offered sufficient time and conditions to meet with his lawyer.

3.5 Article 14, paragraph 3 (g), is said to have been violated as Mr. Khomidov was forced to testify against himself under duress.

3.6 Finally, the author claims that her son's right to life under article 6, paragraphs 1 and 2, of the Covenant was violated, because he was sentenced to death after a trial in which the guarantees in article 14 of the Covenant were not met.

Issues and proceedings before the Committee

4. On 18 September 2002, 2 December 2003, 28 January 2004 and 14 April 2004, the State party was requested to submit to the Committee information on the admissibility and merits of the communication. The Committee notes that this information has still not been received. The Committee regrets the State party's failure to provide any information with regard to admissibility or the substance of the author's claims. It recalls that it is implicit in the Optional Protocol that States parties make available to the Committee all information at their disposal. In the absence of a reply from the State party, due weight must be given to the author's allegations, to the extent that these have been properly substantiated.[2]

Committee's decision on admissibility

5.1 Before considering any claim contained in a communication, the Human Rights Committee must, in accordance with rule 87 of its rules of procedure, decide whether or not the communication is admissible under the Optional Protocol to the Covenant.

5.2 The Committee notes that the same matter is not being examined under any other international procedure and that domestic remedies have been exhausted. No challenge from the State party to this conclusion has been received. The requirements of article 5, paragraph 2 (a) and (b), of the Optional Protocol have thus been met.

5.3 The Committee considers that the author's claims have been sufficiently substantiated for purposes of admissibility, in that they appear to raise issues under articles 6, 7, 9 and 14, paragraphs 1 and 3, (b), (e) and (g), of the Covenant. It therefore proceeds to their examination on the merits.

Examination of the merits

6.1 The Human Rights Committee has considered the present communication in the light of all the information made available to it, as required under article 5, paragraph 1, of the Optional Protocol.

6.2 The Committee has noted the author's detailed description of the acts of torture to which her son was subjected to make him confess guilt. She has identified by name several of the individuals alleged to have participated in the above events. In the circumstances, and in the absence of any explanations from the State party in this respect, due weight must be given to her allegations. As the author has provided detailed information of specific forms of physical and psychological torture inflicted upon her son during pre-trial detention (see paragraphs 2.5 and 2.6), the Committee considers that the facts as submitted disclose a violation of article 7 of the Covenant.

6.3 The author has claimed that her son was detained for one month, during which time he was not informed of the charges against him, and that her son's detention was illegal, in that he was not brought promptly before a judge or other official officer authorized by law to exercise judicial power to review the legality of his detention. In the absence of any State party observations, due weight must be given to the author's allegations. Accordingly, the Committee considers that the facts before it disclose a violation of article 9, paragraphs 1 and 2, of the Covenant.

6.4 The Committee has noted the author's claims that her son was legally represented only one month after being charged with several crimes and all meetings between him and the lawyer subsequently assigned by the investigation were held in investigators' presence, in violation of article 14, paragraph 3 (b). The Committee considers that the author's submissions concerning the time and conditions in which her son was assisted by a lawyer before the trial adversely affected the possibilities of the author's son to prepare his defence. In the absence of any explanations by the State party, the Committee is of the view that the facts before it reveal a violation of Mr. Khomidov's rights under article 14, paragraph 3 (b), of the Covenant.

6.5 The Committee has noted the author's claim that the trial of Mr. Khomidov was unfair, as the court did not fulfil its obligation of impartiality and independence (see paragraphs 2.8 and 2.9 above). It has noted also the author's contention that her son's lawyer requested the court to call witnesses on his behalf, and to have Mr. Khomidov examined by a doctor to evaluate his injuries sustained as a result of the torture to which he was subjected to make him confess guilt. The judge denied his request without providing any reason. In the absence of any pertinent State party information on this claim, the Committee concludes that the facts before it disclose a violation of article 14, paragraphs 1, and 3 (e) and (g), of the Covenant.

6.6 With regard to the author's claim that her son's right to life under article 6 of the Covenant has been violated, the Committee recalls its constant jurisprudence[3] that the imposition of a sentence of death upon the conclusion of a trial in which the provisions of the Covenant have not been respected constitutes a violation of article 6 of the Covenant, if no appeal of the sentence is possible. In this case, the sentence of death was passed in violation of the right to a fair trial as set out in article 14 of the Covenant, and thus also in breach of article 6.

7. The Human Rights Committee, acting under article 5, paragraph 4, of the Optional Protocol to the Covenant, is of the view that the facts before it disclose a violation of articles 7; 9, paragraphs 1 and 2; 14, paragraphs 1, and 3 (b), (e) and (g), read together with article 6, of the Covenant.

8. In accordance with article 2, paragraph 3 (a), of the Covenant, the State party is under an obligation to provide Mr. Khomidov with an effective remedy, entailing commutation of his sentence to death, a compensation, and a new trial with all the guarantees of article 14, or, should this not be possible, release. The State party is under an obligation to take measures to prevent similar violations in the future.

9. Bearing in mind that, by becoming a party to the Optional Protocol, the State party has recognized the competence of the Committee to determine whether there has been a violation of the Covenant or not and that, pursuant to article 2 of the Covenant, the State party has undertaken to ensure to all individuals within its territory or subject to its jurisdiction the rights recognized in the Covenant and to provide an effective and enforceable remedy in case a violation has been established, the Committee wishes to receive from the State party, within 90 days, information about the measures taken to give effect to the Committee's Views. The State party is also requested to publish the Committee's Views.

[Adopted in English, French and Spanish, the English text being the original version. Subsequently to be issued also in Arabic, Chinese and Russian as part of the present report.]

Notes

[1] The Committee became aware of the fact that the President of Tajikistan announced, on 30 April 2004, that a moratorium on the executions of death sentences would be introduced shortly; apparently no execution was carried out since this date. On 2 June 2004 the lower house of the Parliament adopted the law "on the suspension of the application of the death penalty", and on 8 July 2004 it was endorsed by the upper house of the Parliament. However, to have the law entered into force, it still has to be signed by the President.

[2] See *J.G.A. Diergaardt et al. v. Namibia*, case No. 760/1997, Views adopted on 25 July 2000, para. 10.2.

[3] See *Conroy Levy v. Jamaica*, communication No. 719/1996, and *Clarence Marshall v. Jamaica*, communication No. 730/1996.

II. Communication No. 1136/2002, *Borzov v. Estonia* (Views adopted on 26 July 2004, eighty-first session)*

Submitted by:	Mr. Vjatšeslav Borzov (not represented by counsel)
Alleged victim:	The author
State party:	Estonia
Date of communication:	2 November 2001 (initial submission)

The Human Rights Committee, established under article 28 of the International Covenant on Civil and Political Rights,

Meeting on 26 July 2004,

Having concluded its consideration of communication No. 1136/2002, submitted to the Human Rights Committee by Mr. Vjatšeslav Borzov under the Optional Protocol to the International Covenant on Civil and Political Rights,

Having taken into account all written information made available to it by the author of the communication, and the State party,

Adopts the following:

Views under article 5, paragraph 4, of the Optional Protocol

1. The author of the communication is Mr. Vjatšeslav Borzov, allegedly stateless, born in Kurganinsk, Russia, on 9 August 1942 and currently residing in Estonia. The author claims to be a victim of violations by Estonia of article 26 of the Covenant. He is not represented by counsel.

The facts as presented by the author

2.1 From 1962 to 1967, the author attended the Sevastopol Higher Navy College in the specialty of military electrochemical engineer. After graduation, he served in Kamchatka until 1976 and thereafter in Tallinn as head of a military factory until 1986. On 10 November 1986, the author was released from service with rank of captain due to illness. The author has worked, since 1988, as a head of department in a private company, and he is married to a naturalized Estonian woman. In 1991, Estonia achieved independence.

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* The following members of the Committee participated in the examination of the present communication: Mr. Abdelfattah Amor, Mr. Nisuke Ando, Mr. Prafullachandra Natwarlal Bhagwati, Mr. Franco Depasquale, Mr. Walter Kälin, Mr. Ahmed Tawfik Khalil, Mr. Rajsoomer Lallah, Mr. Rafael Rivas Posada, Sir Nigel Rodley, Mr. Martin Scheinin, Mr. Ivan Shearer, Mr. Hipólito Solari Yrigoyen, Ms. Ruth Wedgwood, Mr. Roman Wieruszewski and Mr. Maxwell Yalden.

2.2 On 28 February 1994, the author applied for Estonian citizenship. In 1994, an agreement between Estonia and the Russian Federation entered into force which concerned the withdrawal of troops stationed on the former's territory (the 1994 treaty). In 1995, the author obtained an Estonian residence permit, pursuant to the Aliens Act's provisions concerning persons who had settled in Estonia prior to 1990. In 1996, an agreement between Estonia and the Russian Federation entered into force, concerning "regulation of issues of social guarantees of retired officers of the armed forces of the Russian Federation in the territory of the Republic of Estonia" (the 1996 treaty). Pursuant to the 1996 treaty, the author's pension has been paid by the Russian Federation. Following delays occasioned by deficiencies of archive materials, on 29 September 1998, the Estonian Government, by order No. 931-k, refused the application. The refusal was based on section 8 of the Citizenship Act of 1938, as well as section 32 of the Citizenship Act of 1995 which precluded citizenship for a career military officer in the armed forces of a foreign country who had been discharged or retired therefrom.

2.3 On 23 April 1999, the Tallinn District Court (Administrative Section) rejected the author's appeal against the refusal, holding that while the 1938 Act (which was applicable to the author's case) did not contain the specific exemption found in section 32 of the 1995 Act, the Government was within its powers to reject the application. On 7 June 1999, the Tallinn Court of Appeal allowed the author's appeal against the District Court's decision and declared the Government's refusal of the author's application to be unlawful. The Court considered that in simply citing a general provision of law rather than justifying the individual basis on which the author's application was refused, the Government had insufficiently reasoned the decision and left it impossible to ascertain whether the author's equality rights had been violated.

2.4 On 22 September 1999, upon reconsideration, the Government, by Decree 1001-k, again rejected the application, for reasons of national security. The order explicitly took into account the author's age, his training from 1962 to 1967, his length of service in the armed forces of a "foreign country" from 1967 to 1986, the fact that in 1986 he was assigned to the reserve as a captain, and that he was a military pensioner under article 2, clause 3, of the 1996 treaty pursuant to which his pension was paid by the Russian Federation.

2.5 On 4 October 2000, the Tallinn Administrative Court rejected, at first instance, the author's appeal against the new refusal of citizenship. The Court found that the author had not been refused citizenship because he had actually acted against the Estonian State and its security in view of his personal circumstances. Rather, for the reasons cited, the author was in a position where he could act against Estonian national security. On 25 January 2001, the Tallinn Court of Appeal rejected the author's appeal. The Court, finding the Citizenship Act as amended in 1999 to be the applicable law in the case, found that the Government had properly come to the conclusion that, for the reasons cited, the author could be refused citizenship on national security grounds. It observed that there was no need to make out a case of a specific individual threat posed by the author, as he had not been accused of engaging in actual activities against the Estonian State and its security.

2.6 The author filed a further appeal in cassation to the Supreme Court, arguing that the applicable law was in fact the 1938 Act, and that the Government's order refusing citizenship was insufficiently reasoned, as it simply referred to the law and listed factual circumstances. These circumstances did not, in his view, prove that he was a threat to national security. He also argued that the lower court had failed to assess whether the refusal was in fact discriminatorily based on his membership of a particular social group, in violation of article 12 of the Constitution. On 21 March 2001, the Appeals Selection Panel of the Supreme Court refused the author leave to appeal.

The complaint

3.1 The author argues that he has been the victim of discrimination on the basis of social origin, contrary to article 26 of the Covenant. He contends that section 21 (1) of the Citizenship Act[1] imposes an unreasonable and unjustifiable restriction of rights on the grounds of a person's social position or origin. He argues that the law presumes that all foreigners who have served in armed forces pose a threat to Estonian national security, regardless of the individual features of the particular service or training in question. He argues that there is proof neither of a threat posed generally by military retirees, nor of such a threat posed by the author specifically. Indeed, the author points out that rather than his residence permit being annulled on national security grounds, he has been granted a five-year extension. The author also contends that refusal of citizenship on such grounds is in conflict with an alleged principle of international law pursuant to which persons cannot be considered to have served in a foreign military force if, prior to acquisition of citizenship, they served in armed forces of a country of which they were nationals.

3.2 The author argues that the discriminatory character of the Law is confirmed by section 21 (2) of the Citizenship Act 1995, which provides that Estonian citizenship may be granted to "a person who has retired from the armed forces of a foreign State if the person has been married for at least five years to a person who acquired citizenship by birth" [rather than by naturalization] and if the marriage has not been dissolved. He argues that there is no rational reason why marriage to an Estonian by birth would reduce or eliminate a national security risk. Thus, he also sees himself as a victim of discrimination on the basis of the civil status of his spouse.

3.3 The author argues that, as a result of this legal position, there are some 200,000 persons comprising 15 per cent of the population that are residing permanently in the State party but who remain stateless. As a result of the violation of article 26, the author seeks compensation for pecuniary and non-pecuniary damage as well as costs and expenses of the complaint.

The State party's submissions on the admissibility and merits of the communication

4.1 By submissions of 30 June 2003, the State party contested both the admissibility and the merits of the communication. The State party argues, as to admissibility, that the author has failed to exhaust domestic remedies, and that the communication is incompatible with the provisions of the Covenant as well as manifestly ill-founded. As to the merits, the State party argues that the facts disclose no violation of the Covenant.

4.2 The State party argues that the author did not submit a request to the administrative seeking the initiation of constitutional review proceedings to challenge the constitutionality of the Citizenship Act. The State party refers in this respect to a decision of 5 March 2001 where the Constitutional Review Chamber, on reference from the administrative court, declared provisions of the Aliens Act, pursuant to which the applicant had been refused a residence permit, to be unconstitutional. Additionally, with reference to a Supreme Court decision of 10 May 1996 concerning the Convention on the Rights of the Child, the State party observes that the Supreme Court exercises its capacity for striking down domestic legislation inconsistent with international human rights treaties.

4.3 The State party argues that, as equality before the law and protection against discrimination are rights protected by both the Constitution and the Covenant, a constitutional challenge would have afforded an available and effective remedy. In light of the Supreme Court's recent case law, the State party considers that such an application would have had a reasonable prospect of success and should have been pursued.

4.4 The State party argues, in addition, that the author did not pursue recourse to the Legal Chancellor to verify the non-conformity of an impugned law with the Constitution or Covenant. The Legal Chancellor has jurisdiction to propose a review of legislation regarded as unconstitutional, or, failing legislative action, to make a reference to this effect to the Supreme Court. The Supreme Court has "in most cases" granted such a reference. Accordingly, if the author regarded himself as incapable of lodging the relevant constitutional challenge, he could have applied to the Legal Chancellor to take such a step.

4.5 In any event, the State party argues that the author has not raised the particular claim of discrimination on the basis of his wife's status before the local courts, and this claim must accordingly be rejected for failure to exhaust domestic remedies.

4.6 The State party further contends that the communication is inadmissible for being incompatible with the provisions of the Covenant. It observes that the right to citizenship, much less a particular citizenship, is not contained in the Covenant, and that international law does not give rise to any obligation to grant unconditionally citizenship to a person permanently residing in the country. Rather, under international law all States have the right to determine who, and in which manner, can become a citizen. In so doing, the State also has the right and obligation to protect its population, including national security considerations. The State party refers to the Committee's decision in *V.M.R.B. v. Canada*,[2] where in finding no violation of article 18 or 19 in deporting an alien, the Committee observed that it was not for it to test a sovereign State's evaluation of an alien's security rating. Accordingly, the State argues that the refusal to grant citizenship on the grounds of national security does not, and cannot, interfere with any of the author's Covenant rights. The claim is thus inadmissible *ratione materiae* with the Covenant.

4.7 For the reasons developed below with respect to the merits of the communication, the State party also argues that the communication is manifestly ill-founded, as no violation of the Covenant is disclosed.

4.8 On the merits of the claim under article 26, the State party refers to the Committee's established jurisprudence that not all differences in treatment are discriminatory; rather, differences that are justified on a reasonable and objective basis are consistent with article 26. The State party argues that the exclusion in its law from citizenship of persons who have served as professional members of the armed forces of a foreign country is based on historical reasons, and must also be viewed in the light of the treaty with the Russian Federation concerning the status and rights of former military officers.

4.9 The State party explains that by 31 August 1994, troops of the Russian Federation were withdrawn pursuant to the 1994 treaty. The social and economic status of military pensioners was regulated by the separate 1996 treaty, pursuant to which military pensioners and family members received an Estonian residence permit on the basis of personal application and lists submitted by the Russian Federation. Under this agreement, the author was issued a residence permit entitling him to remain after the withdrawal of Russian troops. However, under the agreement, Estonia was not required to grant citizenship to persons who had served as professional members of the armed forces of a foreign country. As the author's situation is thus regulated by separate treaty, the State party argues that the Covenant is not applicable to the author.

4.10 The State party argues that the citizenship restriction is necessary for reasons of national security and public order. It is further necessary in a democratic society for the protection of State sovereignty, and is proportional to the aim stipulated in the law. In the order refusing the author's application, the Government justified its decision in a reasoned fashion, which reasons, in the State party's view, were relevant and sufficient. In adopting the law in question, it was also taken into account that in certain conditions former members of the armed forces might endanger Estonian statehood from within. This particularly applies to persons who have been assigned to the reserve, as they are familiar with Estonian circumstances and can be called to service in a foreign country's forces.

4.11 The State party emphasizes that the author was not denied citizenship due to his social origin but due to particularized security considerations. With respect to the provision in law allowing the granting of citizenship to a spouse of an Estonian by birth, the State party argues that this is irrelevant to the present case as the author's application was denied on national security grounds alone. Even if the author's spouse were Estonian by birth, the Government would still have had to make the same national security assessment before granting citizenship. The State party invites the Committee to defer, as a question of fact and evidence, to the assessment of the author's national security risk made by the Government and upheld by the courts.

4.12 The State party thus argues that the author was not treated unequally compared to other persons who have professionally served in foreign armed forces, as the law does not allow grant of citizenship to such persons. As no distinction was made on the basis of his wife's status (the decision being made on national security grounds), nor was the author subject to discrimination on the basis of social or family status. The State party argues that the refusal, taken according to law, was not arbitrary and has not had negative consequences for the author, who continues to live in Estonia with his family by virtue of residence permit. The further claim of a large-scale violation of rights in other cases should also be disregarded as an *actio popularis*.

The author's comments on the State party's submissions

5.1 By letter of 27 August 2003, the author responded to the State party's submissions. At the outset, he states that his complaint is not based upon the exemption provisions of the Citizenship Act concerning spouses who are Estonian by birth. Rather, he attacks article 21 (1) of the Citizenship Act, which he argues is contrary to the Covenant as devoid of reasonable and objective foundation and being neither proportional nor in pursuit of a legitimate aim. In all proceedings at the domestic level, he unsuccessfully raised the allegedly discriminatory nature of this provision. The author contends that the courts' rejection of his discrimination claims illustrates that he was denied the equal protection of the law and show that he has no effective remedy.

5.2 As to the possibility of approaching the Legal Chancellor, the author observes that the Chancellor advised him to pursue judicial proceedings. As the author wished to challenge a specific decision concerning him, the issue did not concern legislation of general application, which is the extent of the Chancellor's mandate. In any event, the Chancellor must reject applications if the subject matter is, or has been, the subject of judicial proceedings.

5.3 On the substantive issues, the author argues with reference to the Committee's established jurisprudence that the protections of article 26 apply to all legislative action undertaken by the State party, including the Citizenship Act. He argues that he has been a victim of a violation of his right to equality before the law, as a number of (unspecified) persons in Estonia have received Estonian citizenship despite former service in the armed forces of a foreign State (including the then USSR). The denial in his case is accordingly arbitrary and not objective, in breach of the guarantee of equal application.

5.4 The author observes that as a result of the refusal of citizenship he remains stateless, while article 15 of the Universal Declaration of Human Rights provides for a right to nationality and freedom from arbitrary deprivation thereof. In this context, he argues that article 26 also imposes a positive duty on the State party to remedy the discrimination suffered by the author, along with numerous others, who arrived in Estonia after 1940 but who are only permanent residents.

5.5 The author rejects the characterization that he had twice been refused citizenship on grounds of national security. On the first occasion, he and 35 others were rejected purely on the basis of membership of the former armed forces of the USSR. On the second occasion, the national security conclusion was based on the personal elements set out above. In the author's view, this is in contradiction to other legislation - his residence permit was extended for a further five years, at the same time that the Law on Aliens provides that if a person represents a threat to national security, a residence permit shall not be issued or extended and deportation shall follow. The author contends that he does not satisfy any of the circumstances which the Aliens Act describes as threats to state security.

5.6 By contrast, the author argues he has never represented, and does not currently represent, such a threat. He describes himself as a stateless and retired electrician, without a criminal record and who has never been tried. Additionally, being stateless, he cannot be called for service in the armed forces of a foreign State. There is no pressing social need in refusing him citizenship, and thus no relevant and sufficient reasons to justify the discriminatory treatment are at hand.

5.7 The author also observes that, under the 1996 treaty, discharged military service members (except those who represent a threat to national security) shall be guaranteed residence in Estonia (art. 2 (1)), and Estonia undertook to guarantee to such service members rights and freedoms in accordance with international law (art. 6). The author points out that, contrary to what the State party suggests, he did not receive his residence permit pursuant to the 1996 treaty, but rather first received such a permit in 1995 under article 20 (2) of the Aliens Law as an alien who settled in Estonia before July 1990 and enjoyed permanent registration.

5.8 The author also argues that neither the 1994 nor 1996 treaties address issues of citizenship or statelessness of former military personnel. These treaties are therefore of no relevance to the current Covenant claim. The author also rejects that historical reasons can justify the discrimination allegedly suffered. He points out that after the dissolution of the USSR he was made against his will into a stateless person, and that the State party, where he has lived for an extended period, has repeatedly refused him citizenship. He queries therefore whether he will remain stateless for the remainder of his natural life.

Issues and proceedings before the Committee

Consideration of admissibility

6.1 Before considering any claim contained in a communication, the Human Rights Committee must, in accordance with rule 87 of its rules of procedure, decide whether or not the communication is admissible under the Optional Protocol to the Covenant.

6.2 The Committee has ascertained that the same matter is not being examined under another procedure of international investigation or settlement for the purposes of article 5, paragraph 2 (a), of the Optional Protocol.

6.3 To the extent that the author maintains a claim of discrimination based upon the social status or origin of his wife, the Committee observes that the author did not raise this issue at any point before the domestic courts. This claim accordingly must be declared inadmissible under article 5, paragraph 2 (b), of the Optional Protocol for failure to exhaust domestic remedies.

6.4 As to the State party's contention that the claim concerning a breach of article 26 is likewise inadmissible, as constitutional motions could have been advanced, the Committee observes that the author consistently argued before the domestic courts, up to the level of the Supreme Court, that the rejection of his citizenship claim on national security grounds violated equality guarantees of the Estonian Constitution. In light of the courts' rejection of these arguments, the Committee considers that the State party has not shown how such a remedy would have any prospects of success. Furthermore, with respect to the avenue of the Legal Chancellor, the Committee observes that this remedy became closed to the author once he had instituted proceedings in the domestic courts. This claim, therefore, is not inadmissible for failure to exhaust domestic remedies.

6.5 The Committee takes note of the State party's argument that the Covenant does not apply *rationae materiae* because it concluded, after its ratification of the Covenant, the 1994 treaty with the Russian Federation regarding Estonian residence permits for former Russian military pensioners. It considers, however, that in accordance with general principles of the law of treaties, reflected in articles 30 and 41 of the Vienna Convention on the Law of Treaties, the subsequent entry into force of a bilateral treaty does not determine the applicability of the Covenant.

6.6 As to the State party's remaining arguments, the Committee observes that the author has not advanced a free-standing right to citizenship, but rather the claim that the rejection of his citizenship on the national security grounds advanced violates his rights to non-discrimination and equality before the law. These claims fall within the scope of article 26 and are, in the Committee's view, sufficiently substantiated, for purposes of admissibility.

Consideration of the merits

7.1 The Human Rights Committee has considered the present communication in the light of all the information made available to it by the parties, as provided in article 5, paragraph 1, of the Optional Protocol.

7.2 Turning to the substance of the admissible claim under article 26, the Committee refers to its jurisprudence that an individual may be deprived of his right to equality before the law if a provision of law is applied to him or her in arbitrary fashion, such that an application of law to an individual's detriment is not based on reasonable and objective grounds.[3] In the present case, the State party has invoked national security, a ground provided for by law, for its refusal to grant citizenship to the author in the light of particular personal circumstances.

7.3 While the Committee recognizes that the Covenant explicitly permits, in certain circumstances, considerations of national security to be invoked as a justification for certain actions on the part of a State party, the Committee emphasizes that invocation of national security on the part of a State party does not, ipso facto, remove an issue wholly from the Committee's scrutiny. Accordingly, the Committee's decision in the particular circumstances of *V.M.R.B.*[4] should not be understood as the Committee divesting itself of the jurisdiction to inquire, as appropriate, into the weight to be accorded to an argument of national security. While the Committee cannot leave it to the unfettered discretion of a State party whether reasons related to national security existed in an individual case, it recognizes that its own role in reviewing the existence and relevance of such considerations will depend on the circumstances of the case and the relevant provision of the Covenant. Whereas articles 19, 21 and 22 of the Covenant establish a criterion of necessity in respect of restrictions based on national security, the criteria applicable under article 26 are more general in nature, requiring reasonable and objective justification and a legitimate aim for distinctions that relate to an individual's characteristics enumerated in article 26, including "other status". The Committee accepts that considerations related to national security may serve a legitimate aim in the exercise of a State party's sovereignty in the granting of its citizenship, at least where a newly independent State invokes national security concerns related to its earlier status.

7.4 In the present case, the State party concluded that a grant of citizenship to the author would raise national security issues generally on account of the duration and level of the author's military training, his rank and background in the armed forces of the then USSR. The Committee notes that the author has a residence permit issued by the State party and that he continues to receive his pension while living in Estonia. Although the Committee is aware that the lack of Estonian citizenship will affect the author's enjoyment of certain Covenant rights, notably those under article 25, it notes that neither the Covenant nor international law in general spells out specific criteria for the granting of citizenship through naturalization, and that the author did enjoy a right to have the denial of his citizenship application reviewed by the courts of the State party. Noting, furthermore, that the role of the State party's courts in reviewing administrative decisions, including those decided with reference to national security, appears to entail genuine substantive review, the Committee concludes that the author has not made out his case that the decision taken by the State party with respect to the author was not based on reasonable and objective grounds. Consequently, the Committee is unable, in the particular circumstances of this case, to find a violation of article 26 of the Covenant.

8. The Human Rights Committee, acting under article 5, paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights, is of the view that the facts before it do not disclose a violation of article 26 of the Covenant.

[Adopted in English, French and Spanish, the English text being the original version. Subsequently to be issued also in Arabic, Chinese and Russian as part of the present report.]

Notes

[1] Section 21 (1) provides, in material part:

> Section 21. Refusal to grant or refusal for resumption of Estonian citizenship
>
> (1) Estonian citizenship shall not be granted to or resumed by a person who:
>
> …
>
> (2) does not observe the constitutional order and Acts of Estonia;
>
> (3) has acted against the Estonian State and its security;
>
> (4) has committed a criminal offence for which a punishment of imprisonment of more than one year was imposed and whose criminal record has not expired or who has been repeatedly punished under criminal procedure for intentionally committed criminal offences;
>
> (5) has been employed or is currently employed by foreign intelligence or security services;
>
> (6) has served as a professional member of the armed forces of a foreign State or who has been assigned to the reserve forces thereof or has retired therefrom, and nor shall Estonian citizenship be granted to or resumed by his or her spouse who entered Estonia due to a member of the armed forces being sent into service, the reserve or into retirement.

[2] Case No. 236/1987, decision adopted on 18 July 1988.

[3] See *Kavanagh v. Ireland* (No. 1), case No. 819/1998, Views adopted on 4 April 2001.

[4] Op. cit.

JJ. Communication No. 1160/2003, *G. Pohl et al. v. Austria* (Views adopted on 9 July 2004, eighty-first session)*

Submitted by:	Mr. and Mrs. Godfried and Ingrid Pohl; Mr. Wolfgang Mayer; Mr. Franz Wallmann (represented by counsel, Mr. Alexander H.E. Morawa)
Alleged victim:	The authors
State party:	Austria
Date of communication:	23 September 2002 (initial submission)

The Human Rights Committee, established under article 28 of the International Covenant on Civil and Political Rights,

Meeting on 9 July 2004,

Having concluded its consideration of communication No. 1160/2003, submitted to the Human Rights Committee on behalf of Mr. and Mrs. Godfried and Ingrid Pohl; Mr. Wolfgang Mayer; Mr. Franz Wallmann, under the Optional Protocol to the International Covenant on Civil and Political Rights,

Having taken into account all written information made available to it by the author of the communication, and the State party,

Adopts the following:

Views under article 5, paragraph 4, of the Optional Protocol

1. The authors of the communication are Godfried Pohl (first author), his wife, Ingrid Pohl (second author), Wolfgang Mayer (third author) and Franz Wallmann (fourth author), all Austrian citizens. They claim to be victims of a violation by Austria[1] of article 26 and, insofar as the fourth author is concerned, also of article 14, paragraph 1, of the International Covenant on Civil and Political Rights (the Covenant). They are represented by counsel.

The facts as submitted by the authors

2.1 The first and second authors jointly own, and reside on, property measuring some 1,600 square metres located in the community of Aigen (part of the Municipality of Salzburg). The third author formerly owned a plot of land of some 2,300 square metres, also located in Aigen, adjacent to the plot owned by the first and second authors. On 15 June 1998, the fourth author purchased the plot formerly owned by the third author from a company, which had acquired it at a public auction. As the current owner of the plot, on which he also resides, the fourth author is contractually obliged to reimburse the third author for any expenses associated with that plot.

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* The following members of the Committee participated in the examination of the present communication: Ms. Christine Chanet, Mr. Franco Depasquale, Mr. Maurice Glèlè Ahanhanzo, Mr. Walter Kälin, Mr. Ahmed Tawfik Khalil, Mr. Rajsoomer Lallah, Mr. Rafael Rivas Posada, Sir Nigel Rodley, Mr. Martin Scheinin, Mr. Ivan Shearer, Mr. Hipólito Solari Yrigoyen, Ms. Ruth Wedgwood and Mr. Roman Wieruszewski.

2.2 Both plots of land are designated as "rural areas", in accordance with the 1998 Salzburg Provincial Zoning Law, which divides real estate located in the Province of Salzburg into "building land", "traffic/transportation areas" and "rural areas".

2.3 On 1 December 1998, the Municipality of Salzburg informed the first, second and third authors of a preliminary assessment of the financial implications of the construction, in 1997, of a residential sewerage adjacent to their plots and gave them an opportunity to comment on the assessment.

2.4 According to Section 11 of the Salzburg Provincial Landowners' Contributions Act (1976), which regulates financial contributions of landowners to certain public services in the Municipality of Salzburg, owners of plots of land located adjacent to a newly constructed sewerage must contribute to the construction costs; the contribution is calculated pursuant to a formula based on the square measure of a plot, from which an abstract "length" is deducted. Contributions of landowners in all other municipalities of the Province of Salzburg are regulated by the Provincial Act on Landowners' Contributions to the Construction of Municipal Sewerages in all Municipalities of the Province of Salzburg with the Exception of the City of Salzburg (1962), which provides that owners of land, from which wastewater is dumped into the sewerage, are required to pay contributions for newly constructed sewerages, calculated on the basis of a formula that links the construction costs to the living space of the dwellings built on the plots. The number of "points", calculated on the basis of living space (in square metres), are multiplied by the amount to be paid per point to arrive at an individual landowner's contribution.

2.5 In their observations on the preliminary assessment, the authors argued that the envisaged calculation of their contributions based on the length of the plot was discriminatory, if compared to the calculation of contributions of owners of plots in areas designated as "building land", as it disregarded the special situation of plots in rural areas, which were significantly larger than average parcels in areas designated as "building land". The calculation method in all other municipalities in the Province of Salzburg was therefore based on available living space instead of the abstract length criterion so as to take such special circumstances into account. The authors also stated that the existing waste-water disposal facilities were adequate.

2.6 On 22 February 1999, the Municipality of the City of Salzburg issued two administrative acts, requiring the first and second authors to pay ATS 193,494.20 (€14,061.77) and the third author to contribute ATS 262,838.70 (€19,101.23), pursuant to Section 11 of the Landowners' Contribution Act. It rejected the third author's objection to his treatment as a party to the proceedings despite the fact that he was no longer the registered owner of the plot, stating that the owner registered at the time of the construction of the sewerage was to be considered the obligated party.

2.7 On 11 March 1999, the first, second and third authors appealed the decisions to the Appeals Commission in Building Matters of the Municipality of Salzburg. They reiterated that the length criterion for calculating their contributions was disproportionate and incorrect, given that, pursuant to the 1998 Zoning Law, no new buildings could be built on plots in "rural areas". While owners of plots designated as "building land" were free to demolish existing buildings and construct new and larger ones, the authors, if they decided to demolish their current dwellings, could only use their parcels as pastures.

2.8 On 28 May and 2 July 1999, the Appeals Commission dismissed the appeals, observing that plots designated as "building land" and plots designated "rural" for which a special building permit had been granted, under previous versions of the Zoning Law, had to be treated alike to ensure equal treatment.

2.9 On 29 June and 13 July 1999, the first, second and third authors filed complaints with the Constitutional Court, claiming that the failure, in the Landowners' Contributions Act, to differentiate between "rural" and "building" lots violated their right to equality before the law and the principle of the rule of law, i.e. the right to be subjected only to sufficiently precise laws. In particular, they argued that maintenance of the length criterion failed to take into account the change in the Zoning Law, which absolutely prohibited the construction of dwellings and other buildings on parcels designated "rural" since 1 January 1993, while exceptions to the zoning restrictions were readily granted before that date. On 10 June 2002, the Constitutional Court dismissed the authors' complaints for lack of reasonable prospect of success.

2.10 On 14 August 2002, the authors submitted a further complaint to the Administrative Court, asking it to set aside the impugned administrative acts of 22 February 1999 and to give their complaint suspensive effect. On 9 October 2002, the Court rejected the motion for suspensive effect. The main proceedings were still pending before the Administrative Court at the time of the initial submission of the communication.

The complaint

3.1 The authors allege a violation of their rights under article 26 of the Covenant, claiming that the differentiation between landowners in the Municipality of Salzburg and elsewhere in the Province of Salzburg, as well as the lack of differentiation between owners of parcels zoned "rural" and owners of parcels zoned "building land" within the Municipality of the City of Salzburg, with respect to the payment of landowners' contributions is discriminatory.

3.2 The authors argue that the differentiation between landowners in the City of Salzburg and those residing elsewhere in the Salzburg Province is neither based on prima facie objective and reasonable criteria nor proportionate. Thus, the municipalities surrounding Salzburg are equally and, in some cases, even more residential than the city itself, whereas some areas of the city, including the authors' plots, are more "rural" than those of other municipalities and other cities in the vicinity. It was therefore unjustified to treat landowners in the City of Salzburg less favourably than landowners elsewhere,[2] to whom the more beneficial 1962 Act applied. The latter required contributions only from landowners dumping wastewater into the sewerage and calculated their contributions on the basis of the reasonable criterion of living space of their dwellings. This differentiation had far-reaching adverse effects, as the authors' contributions to the construction of the sewerage were three to four times higher than, for instance, the contributions charged from residents of the municipality of Koppl, without there being any indication that the construction of sewerages in the City of Salzburg was three or four times more expensive than elsewhere in the Province of Salzburg.

3.3 The authors submit that article 26 of the Covenant requires that objectively unequal situations be treated differently. The lack of differentiation, whether intentional or not,[3] between owners of plots designated as "rural" and owners of those designated as "building land", within the Municipality of the City of Salzburg, was discriminatory, as it failed to take into account the changes introduced by the 1992 Zoning Law, which absolutely prohibits any construction on plots designated as "rural", while owners of plots on "building land" remain free to construct new or replace old homes, to develop and subdivide their land, and to build a range of residential or even commercial structures. By basing the assessment of contributions solely on the criterion of the size of the lot, the Landowners' Contributions Act (1976) favoured owners of "building" lots, which can be occupied by a large number of residents using the newly constructed sewerage, over owners of "rural" lots, usually occupied by only a few residents living in single-family homes, who must pay the same or even larger contributions to the construction of sewerages, depending on the size of the lot. In the absence of an objective and reasonable justification, the failure to differentiate in the 1976 Act must be considered a "convenient omission"[4] to adjust its provisions to the 1992 Zoning Law.

3.4 The authors state that the same matter is not being examined under another procedure of international investigation or settlement. They claim to have exhausted domestic remedies, despite the proceedings pending before the Administrative Court, since that Court was not in a position to rectify the alleged breaches of article 26 of the Covenant, as it was bound to apply the laws in force, without being competent to review their constitutionality and legal validity. Even if the Administrative Court was to grant the authors' motion to initiate a formal procedure before the Constitutional Court in order to examine the constitutionality of the Landowner's Contributions Act, the unlikelihood that the Constitutional Court would overrule its previous decision in the same matter rendered this remedy ineffective.

State party's observations on the admissibility and authors' comments thereon

4.1 On 23 May 2003, the State party challenged the admissibility of the communication, arguing that it is inadmissible under articles 1 and 5, paragraph 2 (b), of the Optional Protocol insofar as the fourth author is concerned.

4.2 The State party submits that the fourth author failed to exhaust domestic remedies and that he cannot claim to be a directly affected victim of a violation of any of the rights in the Covenant, since he was never required to pay a contribution to the construction of the sewerage and was only contractually liable to reimburse the third author. An author who essentially asserts the rights of another is not entitled to submit a communication, in accordance with the Committee's jurisprudence.[5] In the absence of *locus standi*, the fourth author's communication constitutes an *actio popularis* directed against the Austrian legal system as such.

4.3 As for the other three authors, the State party informs the Committee that the Administrative Court dismissed their complaint on 28 April 2003.

5.1 In his comments dated 11 June 2003 the fourth author rejects the State party's admissibility observations and amends his communication to the effect that he also claims a violation of his rights under article 14, paragraph 1, of the Covenant.

5.2 The fourth author submits that he is directly affected by the imposition of landowner's contributions, as property tax liabilities and related fees and contributions are "attached" to any given plot of land. Thus, if the third author fails to pay the contributions for the construction of the sewerage, the public authorities would begin enforcement measures against the plot of land itself, which was currently owned by the fourth author.

5.3 The fourth author argues that he was legally prevented from exhausting domestic remedies, as his attempt to be heard, instead of the third author, in the landowners' contributions assessment proceedings was rejected by the Municipality of Salzburg, on the basis that it was "impossible to issue decisions requiring payment of landowners' contributions directly to the current owner", given that "the date on which a duty to pay contributions becomes established (in the present case the construction of the main sewerage line) is decisive for the duty to pay contributions".[6]

5.4 The fourth author claims that his exclusion from the landowners' contributions assessment proceedings had the effect of depriving him of the right to challenge the duty to pay landowners' contributions, as well as the amount due, in violation of article 14, paragraph 1. Private law proceedings against the third author would not enable him directly and independently to object to the existence and/or the extent of such dues. Article 14, paragraph 1, applied to his monetary claim, involving the obligation to pay landowner's contributions.

State party's additional observations on admissibility and on the merits

6.1 On 6 August 2003, the State party made an additional submission on the admissibility and also commented on the merits of the communication. It challenges the admissibility on the lack of substantiation and absence of *locus standi* (third and fourth authors), as well as *ratione materiae* (fourth author). Subsidiarily, it denies violations of articles 14, paragraph 1, and 26.

6.2 On admissibility, the State party submits that no request by the fourth author to join the landowners' contributions assessment proceedings can be traced in the administrative files. The fourth author failed to specify, in his submission of 11 June 2003, when and whether he had paid any contributions and whether he had been ordered to do so by the authorities.

6.3 The State party argues that the payment order addressed to the third author did not *ex lege* pass to the fourth author after the change of ownership of the plot of land, as no universal succession took place. Although initially a lien was placed on the third author's plot of land, pursuant to section 1, paragraph 6, of the Landowners' Contributions Act, this lien had passed to the highest bid [the proceeds of the execution] during the compulsory sale of the property, so that the fourth author purchased the property free from any lien. The mere fact that the fourth author felt obliged, as a result of the sales contract, to remit the contribution payments for the construction of the sewer, as well as the compensation of costs awarded to the City of Salzburg by the Administrative Court in its decision of 28 April 2003, does not imply that he was legally obliged to do so, in the absence of an express stipulation to that effect in the sales contract or in the decision of 12 June 1998 on the distribution of the amount constituting the highest bid.

6.4 The State party contends that, in the alternative, if the Committee considers the communication admissible with regard to the fourth author, it must necessarily declare it inadmissible in relation to the third author, since his obligations would have been assumed contractually by the fourth author. In any event, the third author lacked *locus standi* because the payment obligation had been fulfilled through the remittance of the charged amount by the fourth author on 28 October 2002.

6.5 The State party submits that the fourth author's claim under article 14, paragraph 1, is inadmissible *ratione materiae*, since proceedings for the determination of taxes and duties are not as such covered by the scope of that article.

6.6 On the merits, the State party submits that the "dual system", subjecting landowners in the City of Salzburg to a different legal regime than landowners elsewhere in the Province of Salzburg, goes back to the nineteenth century, when the sewage system merely consisted of main sewers constructed in the densely built area of the City of Salzburg through which effluents were discharged into the river. The construction and management of sewage disposal plants falls within the competence of the municipalities. In the municipalities outside the City of Salzburg, the first sewage treatment plants were constructed in the early 1960s. Under the 1962 Act, such infrastructural measures had to be paid by the landowners, unlike in the City of Salzburg, where landowners are not required to contribute in advance to the costs of water treatment plants, which are rather added to their obligatory periodical fees for usage of the sewer system, but only to the construction and extension of the sewerage system for plots of land.

6.7 The State party argues that the provisions of the 1962 Act, applicable to rural areas, cannot be applied to the City of Salzburg. In particular, the requirement that a new sewerage system consisting of a network and a water treatment plant is constructed as a project with a certain capacity and absorption power, that the catchment area of the respective network is known, and that all plots of land with or without dwellings are evaluated in accordance with technical sewage conditions, would not be suitable for the rapidly developing City of Salzburg, where annexes to existing buildings and additional constructions are built more frequently than in other parts of the province, thus requiring a sewerage network that meets these dynamic developments, which invariably results in higher construction costs.

6.8 Regarding the lack of differentiation between owners of plots designated as "rural" and owners of plots designated as "building land" within the City of Salzburg, the State party submits that contributions to the construction costs for the sewerage network are linked to a plot defined as "building site", irrespective of whether the building site is situated on "building land" or "green land". To what extent a plot of land is defined as "building site" depended on the landowner's request in the proceedings on the declaration as a building site. The authors would have been free to file a request that only part of their property be designated as "building site", which would have resulted in more favourable contributions.

6.9 The State party denies that any construction on "green land" is absolutely prohibited. Thus, the extension of existing dwellings was permissible to the extent provided for in the 1998 Regional Planning Act. It would therefore amount to unjustifiable preferential treatment of owners of building sites on plots designated as "rural" if they were to be charged no or a significantly lower contribution for the construction of sewerages than owners of building sites situated on "building land". Apart from this, dwellings had already been constructed on the author's plots.

6.10 Lastly, the State party submits that the matter had been examined by the Constitutional Court on various occasions, without the Court ever having found a violation of the equality principle. It concludes that, in the present case, the decisions and judgements based on the Landowners' Contributions Act were justified by reasonable and objective criteria and that neither article 26 nor article 14, paragraph 1, were violated.

Author's comments on State party's observations on the merits

7.1 On 13 October 2003, the authors commented on the State party's submission of 6 August 2003, arguing that the third and fourth authors should also be considered as victims, and that the imposition of the payment orders violated their rights under article 26 and, with respect to the fourth author, under article 14, paragraph 1, of the Covenant.

7.2 The authors reiterate that the State party's contention that either the third or the fourth author should be rejected as a victim implies that both authors could per se be accepted as victims. Thus, the third author was a party to the proceedings and listed as one of the petitioners in the decision of the Constitutional Court of 10 June 2002. Whether or not the fourth author ultimately refunded to him the landowners' contributions and legal fees was immaterial for his *locus standi*. It was apparent from the files that the fourth author had requested, and been refused, to join the assessment proceedings as a party, since the impugned administrative act addressed the issue of his standing. He also had a procedural and monetary interest in their outcome, as the deed of sale of the plot of land signed and executed on 15 June 1998, in conformity with Austrian legal practice, explicitly stipulated that "taxes and contributions" are transferred to the buyer. In the absence of any applicable exception, the lien on the property acquired would have required the fourth author to pay the contribution irrespective of whether the acquisition amounted to universal succession. Both authors therefore had *locus standi*, considering that admissibility requirements should be applied with a certain degree of flexibility.[7]

7.3 The authors argue that, although different exigencies justifying a "dual system" of landowners' contributions applied to the modernization of waste-water treatment in the City and in the rest of the Province of Salzburg in the 1960s, such differences had ceased to exist by the end of the 1990s, when 90 per cent of households and businesses in both the City and in the Province of Salzburg were connected to municipal sewer systems. Relevant statistics[8] showed that population growth and increase of construction in residential areas are in fact more dynamic in other municipalities in the Province of Salzburg, especially in the rapidly developing areas in the vicinity of the City. The State party should have reviewed its legislation in the light of these factual changes.[9] Its argument that, outside the City, sewerage systems could be constructed based on more stable data no longer applied and was not supported by statistics, surveys, maps, or zoning plans in the State party's merits submission.

7.4 The authors deny that the Landowners' Contributions Act is applied to their benefit, insofar as landowners are not required to contribute to the construction costs for new sewage disposal plants, which are rather financed through periodical usages fees. The City regulations still required them to pay three to four times higher contributions compared to the rest of the Province, if the calculation was based on the size of living space of the dwelling currently existing or under construction on the plot, the only reasonable and objective criterion, indicative of the number of persons residing on the property and using the water disposal system.

7.5 Concerning the absence of differentiation between landowners within the City of Salzburg, the authors submit that the question is not whether they could have limited their property rights by asking for only a fraction of their plots of land to be declared a "building site", in order to reduce their landowners' contributions, but whether the calculation method applied reasonably or unreasonably differentiated between owners of plots designated as "rural" and owners of plots designated as "building land". While such a declaration would have reduced the amount of their contributions, it would not have changed the way they were calculated, which was at the basis of the alleged breach of article 26 of the Covenant.

7.6 Lastly, the authors submit that section 24 of the Zoning Law places exceptionally strict restrictions on the construction of extensions and additions in "rural" zones, as such additions may not alter the size and appearance of the existing buildings. Moreover the limitation of the living space to 250 square metres per floor would render any extension of their buildings virtually impossible. While subscribing to the legislative aim of conservation of nature, the authors note that the Landowners' Contributions Act does not make adequate provision for cases like theirs, where the property is particularly large, yet subject to restrictions which prevent further construction and thereby an increased use of the sewerage lines and installations.

Issues and proceedings before the Committee

Consideration of admissibility

8.1 Before considering any claim contained in a communication, the Human Rights Committee must, in accordance with rule 87 of its rules of procedure, decide whether or not the communication is admissible under the Optional Protocol to the Covenant.

8.2 The Committee notes the State party's uncontested submission that the fourth author remitted the amount charged to the third author in the decision of the Municipality of Salzburg of 22 February 1999, as well as the legal costs awarded to the City of Salzburg in the Administrative Court's decision of 28 April 2003. It observes that the third author's claim under article 26 of the Covenant has become moot with the fulfilment of his payment obligations. The communication is therefore inadmissible, under article 1 of the Optional Protocol, insofar as the third author is concerned.

8.3 The Committee notes the State party's argument that the fourth author has no victim status, as he was not legally obliged to pay the landowners' contributions charged to the third author, in the absence of an explicit clause to that effect in the sales contract or in the decision on the distribution of the amount constituting the highest bid, dated 12 June 1998. It also notes the State party's contention that he failed to exhaust domestic remedies, since no request to join the landowners' contributions assessment proceedings can be traced in the files. It finally notes the fourth author's objection that he was legally obliged to reimburse the third author and was prevented from exhausting domestic remedies, because the Municipality of Salzburg, by decision of 22 February 1999, rejected him as a party to the assessment proceedings.

8.4 Concerning the fourth author's *locus standi* under article 1 of the Optional Protocol, the Committee notes that the deed of the sale of the plot of land, executed on 16 June 1998 by a notary public, states that, along with the possession, usufruct and benefits, any risk, taxes and contributions are passed on to the buyer, the fourth author.[10] Irrespective of the existence of a lien on the acquired property, the Committee is therefore satisfied that the fourth author has substantiated, for purposes of admissibility, that he was directly affected by the imposition of the landowners' contributions originally charged to the third author and remitted by the fourth author, in fulfilment of his contractual obligations under the sales contract.

8.5 Regarding domestic remedies, the Committee recalls that article 5, paragraph 2 (b), of the Optional Protocol only requires authors to exhaust all available domestic remedies and observes that the State party has failed to describe which legal remedies would have been available to the fourth author, after the Municipality of Salzburg rejected his request to join the assessment proceedings as a party.

8.6 However, the Committee considers that the fourth author has failed to substantiate his claim that this rejection amounted to a denial of his right to equal access to the courts, in violation of article 14, paragraph 1, of the Covenant.

8.7 As to the alleged violation of article 26 of the Covenant, the Committee considers that the authors have sufficiently substantiated their claim, for purposes of admissibility. It follows that the communication is admissible to the extent that it appears to raise issues under article 26 of the Covenant, insofar as the first, second and fourth authors are concerned.

Consideration of the merits

9.1 The Committee has considered the merits of the communication in the light of all the information made available to it by the parties, as provided in article 5, paragraph 1, of the Optional Protocol.

9.2 The Committee begins by noting that, pursuant to article 50 of the Covenant, the delegation of competence for the construction and management of sewage disposal plants to Austrian provinces and municipalities does not relieve the State party of its obligations under the Covenant.[11] Accordingly, the State party's responsibility may be engaged by virtue of the impugned decisions of the Municipality of Salzburg based on provincial legislation, which have, moreover, been confirmed by the Austrian courts.

9.3 The question before the Committee is whether the relevant legislation regarding the financial contributions of landowners in the Municipality of Salzburg to the construction of municipal sewerages violates article 26 of the Covenant by first not distinguishing between plots of an urban character designated as "building land" and "rural" plots of land with a building site, and second by using the size of plots of land (so called "length") as basis for the calculation of the contributions instead of linking them to the size of living space as is done in all other municipalities of the Province of Salzburg.

9.4 The Committee recalls that under article 26, discrimination in the equal protection of the law is prohibited on any grounds such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.[12] It notes that an indirect discrimination may result from a failure to treat different situations differently, if the negative results of such failure exclusively or disproportionally affect persons of a particular race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.[13] While the Committee does not exclude that "residence" may be a "status" that prohibits discrimination, it notes that the alleged failure to distinguish between "urban" and "rural" plots of land is not linked to a particular place of residence within the municipality of Salzburg but depends on their assignment to a particular zoning area. The Committee also takes note of the State party's explanation that the degree of contributions for "rural" parcels does depend on how much of the plot its owner sought to have designated as an area where a building may be constructed. The Committee concludes that the failure to distinguish between urban "building land" and "rural" plots of land with a building site is neither discriminatory by reference to any of the grounds mentioned in article 26 of the Covenant, nor arbitrary.

9.5 With regard to the claim that the different treatment of landowners in the City of Salzburg and landowners elsewhere in the Province of Salzburg, concerning the calculation of their landowners' contributions for the construction of new sewer systems for their plots of land, is not based on objective and reasonable criteria, as required by article 26 of the Covenant, the Committee considers that the authors' argument relating to the perceived more dynamic increases in population and incidence of construction in other parts of the Province of Salzburg does not exclude that the construction costs for the sewer network in the more densely populated Municipality of Salzburg may still be higher than in the rest of the Province, as claimed by the State party.

9.6 In this connection, the Committee notes that the authors admit that their landowners' contributions would still be three to four times higher, if compared to the rest of the Province, even if the calculation was based on the size of the living space of the dwelling situated on the plot of land. It cannot therefore be concluded that the different levels of contributions in and outside the City of Salzburg result exclusively from the different calculation methods applied under the 1976 Salzburg Provincial Landowners' Contributions Act and the 1962 Act applicable to the other municipalities in the Province of Salzburg. The Committee therefore considers that the authors have failed to demonstrate that their different treatment was not based on objective and reasonable criteria.

9.7 The Committee, moreover, considers that nothing in the decisions of the Appeals Commission in Building Matters of the Municipality of the City of Salzburg, dated 28 May and 2 July 1999, or in the decision of the Administrative Court of 28 April 2003 indicates that the application by these tribunals of the relevant provisions of the Landowners' Contributions Act (1976) was based on manifestly arbitrary considerations.

9.8 The Human Rights Committee, acting under article 5, paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights, is of the view that the facts before it do not disclose a violation of article 26 of the Covenant.

[Adopted in English, French and Spanish, the English text being the original version. Subsequently to be issued also in Arabic, Chinese and Russian as part of the present report.]

Notes

[1] The Covenant and the Optional Protocol to the Covenant entered into force for the State party respectively on 10 December 1978 and 10 March 1988.

[2] The authors submit that the overwhelming majority of Provinces and municipalities in Austria utilize "living space" or related criteria as a basis for calculating landowners' contributions, and cite several examples.

[3] The authors refer to communication No. 516/1992, *Alina Simunek v. The Czech Republic*, Views of 19 July 1995, at para. 11.7.

[4] Counsel refers to the judgement of the European Court of Human Rights in *Larkos v. Cyprus* of 18 February 1999.

[5] The State party refers to communication No. 737/1997, *Michelle Lamagna v. Australia*, decision on admissibility of 7 April 1999.

[6] Decision of the Municipality of Salzburg of 22 February 1999, addressed to the third author, at p. 3.

[7] The authors refer to the jurisprudence of the European Court of Human Rights, inter alia, in *Stögmüller v. Austria*, judgement of 10 November 1969, Series A, No. 9, at para. 11, and *Ringeisen v. Austria*, judgement of 16 July 1971, Series A, No. 13, at paras. 89 and 92.

[8] Detailed statistics are included in the communication.

[9] By way of analogy, the authors refer to the Committee's jurisprudence that the Covenant must be interpreted in the light of changing social standards and perceptions. See communication No. 172/1984, *S.W.M. Broeks v. The Netherlands*, Views adopted on 9 April 1987, at para. 14; communication No. 182/1984, *Zwaan-de Vries v. The Netherlands*, Views adopted on 9 April 1987, at para. 14.

[10] See of the deed of sale of the plot of land, executed on 16 June 1998 by Mr. G.S., public notary, file No. 14526/98, at p. 4.

[11] See, e.g., communications Nos. 298/1988 and 299/1988, *Lindgren et al. v. Sweden* and *Lindquist et al. v. Sweden*, Views adopted on 9 November 1990, at para. 10.4.

[12] Communication No. 196/1983, *Gueye v. France,* Views adopted on 3 April 1989, at para. 9.4.

[13] See, e.g., communication No. 998/2001, *Althammer v. Austria*, Views adopted on 8 August 2003, at para. 10.2.

KK. Communication No. 1167/2003, *Ramil Rayos v. The Philippines* (Views adopted on 27 July 2004, eighty-first session)*

Submitted by:	Ramil Rayos (represented by counsel, the Free Legal Assistance Group)
Alleged victim:	The author
State party:	Philippines
Date of communication:	24 March 2003 (initial submission)

The Human Rights Committee, established under article 28 of the International Covenant on Civil and Political Rights,

Meeting on 27 July 2004,

Having concluded its consideration of communication No. 1167/2003, submitted to the Human Rights Committee on behalf of Ramil Rayos under the Optional Protocol to the International Covenant on Civil and Political Rights,

Having taken into account all written information made available to it by the author of the communication, and the State party,

Adopts the following:

Views under article 5, paragraph 4, of the Optional Protocol

1.1 The author of the communication is Ramil Rayos, a Filipino national, currently detained under sentence of death at New Bilibid Prisons, Muntinlupa City. He claims to be a victim of violations of articles 5, 6, paragraphs 1 and 2, 7, 9, paragraphs 1 and 2, 10, paragraph 1, and 14, paragraphs 1, 2, 3 (a), (b), (g) and 5 of the Covenant. He is represented by counsel, the Free Legal Assistance Group. The Covenant entered into force for the State party on 23 January 1987, and the Optional Protocol on 22 November 1989.

1.2 On 24 March 2003, the Human Rights Committee, through its Special Rapporteur on new communications, requested the State party, pursuant to rule 86 of its rules of procedure, not to carry out the death sentence against the author whilst his case was before the Committee.

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* The following members of the Committee participated in the examination of the present communication: Mr. Abdelfattah Amor, Mr. Nisuke Ando, Mr. Prafullachandra Natwarlal Bhagwati, Ms. Christine Chanet, Mr. Franco Depasquale, Mr. Maurice Glèlè Ahanhanzo, Mr. Walter Kälin, Mr. Ahmed Tawfik Khalil, Mr. Rajsoomer Lallah, Mr. Rafael Rivas Posada, Sir Nigel Rodley, Mr. Martin Scheinin, Mr. Ivan Shearer, Mr. Hipólito Solari Yrigoyen, Ms. Ruth Wedgwood, Mr. Roman Wieruszewski and Mr. Maxwell Yalden.

The texts of two individual opinions signed separately by Committee members Mr. Nisuke Ando and Ms. Christine Chanet are appended to the present document.

The facts as presented by the author

2.1 On 9 April 1997, at about 7 p.m., the author arrived at his aunt's residence. When his aunt met him outside her residence he was drunk. The author's cousins were also outside and drunk. In their presence, the author became unruly and destroyed several benches outside the house. Fearing that her sons might assault the author, his aunt left the house to look for help and came across her cousin, a policeman who agreed, at her request, to bring the author to the municipal jail, to sleep off his intoxication.

2.2 On 10 April 1997, without being in possession of an arrest warrant as required by article III, section 3 (1), of the Philippine Constitution, the police refused the author permission to leave the jail. They informed him that they were looking for a murder suspect with long hair, and that he was a suspect.

2.3 On 11 April 1997, after two days of detention, the author was forced to sign an extrajudicial confession, in which he admitted to having raped and killed one Mebelyn Gaznan.[1] According to the author, a policeman forced him to sign the confession by poking a gun at him, and when he initially refused, he was struck with the gun on his back. He was not given an opportunity to read the confession before he signed it.

2.4 A lawyer - not of the author's own choosing - was present "to assist [him] in giving a written confession". He did not have a lawyer prior to the confession. For the trial, the author had a different lawyer with whom he was only able to communicate for a few minutes at a time each day during the trial court proceedings.

2.5 On 29 April 1998, the Regional Trial Court of Cagayan de Oro City found the author guilty of "the complex crime of rape with homicide". He was sentenced to death by lethal injection and ordered to pay compensation of PHP 100,000 to the victim's surviving heirs.

2.6 On 7 February 2001, under its automatic review procedure, the Supreme Court affirmed the death sentence but increased the author's civil liability to PHP 145,000.
On 6 September 2001, this judgement became final and executory.

The complaint

3.1 The author claims a violation of articles 5 and 6, as on 13 December 1993 and pursuant to Act No. 7659, the State party reintroduced the death penalty by electrocution. He claims that although article 6 does not require all States parties to abolish the death penalty, it is clear on a joint reading of paragraphs 1 and 2 of this article, that once a State party has abolished the death penalty it is not open to it to reintroduce it. He claims that an "extensive interpretation" of the Covenant that would allow such a reintroduction would run counter to paragraph 2 of article 5. In addition, he submits that the Second Optional Protocol to the Covenant, aiming at the abolition of the death penalty, the growing worldwide trend towards abolition and the principles of international justice as reflected in the statutes of the ICTY, ICTR and ICC require article 6 to be interpreted in a way that would prevent States parties from reintroducing the death penalty.

3.2 The author claims a violation of article 6, paragraphs 1 and 2, as by extending the death penalty to crimes such as kidnapping, drug-related offences, rape and qualified bribery, the State party violates its obligation to restrict the death penalty to the "most serious crimes". In this regard, the author refers to the Committee's general comment on article 6 in which the Committee expressed the view that the phrase "most serious crime" should be interpreted restrictively, "to mean that the death penalty should be quite an exceptional measure". He also refers to ECOSOC resolution 1984/50 on "Safeguards guaranteeing the protection of rights and freedoms of those facing the death penalty", which interprets the phrase "most serious crimes" as not going beyond intentional crimes with lethal or other extremely grave consequences.

3.3 It is claimed that the author's rights under article 7 would be violated if he were to be put to death, he claims that his rights would be violated under article 7, as the procedure set out in document EP 200 issued by the Bureau of Corrections pursuant to Republic Act 8177, states that the condemned prisoner shall only be notified of the execution date at dawn on the date of execution itself; and that the execution must take place within 8 hours of the condemned prisoner being informed. No provision is made for notifying the condemned person's family, nor is any provision made to allow contact between the individual and his family. This is said to amount to psychological torture. The only contact the condemned prisoner may have is with a cleric or a lawyer, which must take place through a mesh screen, with the content of the meeting being recorded.

3.4 The author claims a violation of article 10, paragraph 1, since the above procedure is said to violate the inherent dignity of the human person.

3.5 The author claims violations of article 9, paragraphs 1 and 2, and 14, paragraph 3 (a), as he was deprived of his liberty without an arrest warrant, and there are no written records showing that, at the time of arrest, he was informed by the police of the reasons for his arrest, his right to silence and his right to counsel.

3.6 The author claims a violation of article 14, paragraph 1, as there are no records showing that upon his arrest, he was informed by the police of the reasons for his arrest, his right to remain silent and his right to a lawyer of his own choosing. In addition, the author claims that he was not accorded his right to counsel of his choice and was not attended by police appointed counsel until the second day of his detention.

3.7 The author claims a violation of article 14, paragraph 2, arguing that in finding him guilty of the crimes charged, the Regional Trial Court not only admitted but also relied on his extrajudicial confession. While the Philippine Supreme Court, on automatic review, set aside the confession, it nonetheless confirmed the trial court's judgement on the basis of alleged circumstantial evidence. According to the author, such reliance on circumstantial evidence "unduly shifted the burden of proof from the prosecution to the accused".

3.8 The author claims a violation of article 14, paragraph 3 (a), as he was not informed of the reasons for the charges against him.

3.9 The author claims a violation of article 14, paragraph 3 (b), because he did not have adequate time and facilities to prepare his defence, or to communicate with counsel for his trial, in that he could only consult with counsel for a few moments during each day of the trial. He also alleges a violation of article 14, paragraph 3 (g), because he was compelled to sign a confession.

3.10 The author claims a violation of article 14, paragraph 5, on account of the failure of the Supreme Court to give due consideration to the actual testimony given by one Dr. Angelita Enopia, during the trial, in which she testified that "it is possible that the child was raped" rather than clearly affirming that, on the basis of her autopsy, she was raped. He also claims that the Supreme Court failed to consider evidence from the official records, which allegedly tended to exculpate the accused. By failing to do so, the Supreme Court is said to have failed to afford the author the right to review of his sentence, as required under article 14, paragraph 5, of the Covenant. The author explains that during the automatic review process it is not usual for judges of the Supreme Court to hear the testimony of any witnesses but to rely, as they did in this case, on testimony given during the trial.

The State party's submission on admissibility and merits

4.1 By submission of 24 October 2003, the State party contests the admissibility and merits of the communication. In general on admissibility, it submits that all the author's claims are unsubstantiated, as they are "devoid of merit". On the claim relating to article 9, it argues that the author failed to exhaust domestic remedies. It submits that the author was initially escorted to the Municipal hall not because of the crime with which he was eventually charged and for which he was convicted, but because of disorderly behaviour. He was placed behind bars to prevent him from inflicting injury upon himself or others until he recovered from intoxication. He was not allowed to leave jail the next morning as in the meantime a complaint had been lodged against him for "rape-slay". It is submitted that the author did not raise the claim that his arrest was in any way defective before the trial court, and is therefore precluded from raising the issue before the Committee: under domestic law any objection, defect or irregularity relating to an arrest must be made before an accused enters his plea on arraignment.

4.2 On the merits and concerning article 6, paragraph 2, the State party considers the argument advanced to be a normative one which is outside the remit of the Committee. It is said to be purely an argument on the wisdom of imposing the death penalty for certain offences, while the determination of which crimes should so qualify is purely a matter of domestic discretion. According to the State party, the Covenant does not limit the right of the State party to determine the wisdom of a law that imposes the death penalty. The State party contends that the constitutionality of the law on the death penalty is a matter for the State party itself, and recalls that its Supreme Court had upheld the constitutionality of the law in question.[2] It further argues that it does not fall to the Committee to interpret a State party's Constitution for the purpose of determining that State party's compliance with the Covenant.

4.3 Concerning the author's claim that the death penalty is not imposed for the "most serious" crimes, the State party notes that States have a wide discretion in interpreting this provision in the light of culture, perceived necessities and other factors, as the notion "most serious crimes" is not defined any more explicitly in the Covenant. As to the contention that article 6 must be interpreted in such a way as to prevent States parties from reintroducing the death penalty pursuant to the Second Optional Protocol to the Covenant, the State party submits that this claim is without merit as it has neither signed nor ratified this Protocol.

4.4 On the claim that the failure to set the date of execution and notify the author in advance of this date violates articles 7 and 10, paragraph 1, the State party submits that under section 15, read together with section 1, of Republic Act No. 8177, the death sentence shall be carried out "not earlier than one (1) year nor later than eighteen (18) months after the judgement has become final and executory, without prejudice to the exercise by the President of his executive clemency powers at all times". Thus, death row inmates are assured of up to 18 months, from the time the judgement imposing the death penalty becomes final and executory, during which they may seek executive clemency and attend to all his practical and spiritual needs. The State party challenges the claim that the author cannot bid farewell to family after notification, as under section 16 of Republic Act No. 8177, during the period between notification and execution, the condemned prisoner shall, as far as practicable, be furnished such assistance as he requests in order to be attended to by a representative of the religion he professes, his lawyer, members of his family and/or business partners.

4.5 The State party dismisses the allegations of violations of article 9, paragraphs 1 and 2. It refers to its argument on admissibility above-mentioned and submits that even if the State party were to acknowledge that the arrest was illegal, this would not be sufficient under domestic law to set aside a judgement rendered by a court after a trial free from error.

4.6 The State party rejects as unfounded the author's claims under article 14. The author was provided with the assistance of counsel during the preparation of his confession. His counsel cautioned him that a confession, once executed, could be used against him in a court of law and that the crime of which he was charged was punishable by death. Following this advice, the author maintained his wish to make a confession. He did not object to the counsel provided, and therefore, under domestic law, was deemed to have made his confession voluntarily and freely. According to the State party, if he had had an objection to the State counsel, he could have objected and requested another lawyer.

4.7 Concerning the author's claim that there was no official record showing that prior to his confession, he was informed of his right to remain silent, and to be represented by a competent and independent counsel of his choice, the State party submits that it has been established under domestic law that "the constitutional procedures on custodial investigations do not apply to a spontaneous statement, not elicited through direct questioning by the authorities, but given in an ordinary manner whereby the accused orally admitted having committed the crime".[3] At any rate, the State party submits that the Supreme Court, in affirming the author's conviction, did not rely on his confession, as his guilt was established by circumstantial evidence.

4.8 As to the Supreme Court's reliance on circumstantial evidence in affirming the author's conviction, the State party explains the circumstances in which domestic courts accept such evidence and points out that in cases of rape with homicide, because of the nature of the crime, the evidence against the accused is generally circumstantial. In the State party's view, in the instant case, the pieces of evidence, taken in their entirety, unmistakably point to the guilt of the author. It also submits that "an alleged infringement of the constitutional rights of the accused under custodial investigation is relevant and material only to cases in which an extrajudicial admission or confession extracted from the accused becomes the basis of his conviction".[4]

4.9 As to the claim that the testimony of the witnesses were not credible, the State party submits that it was sufficiently established at trial that the witnesses did not have any ill-motive to falsely implicate and testify against the author and that, pursuant to the domestic law of the State party, factual findings of the trial court made on the basis of its assessment of the credibility of witnesses are given great weight and, barring arbitrariness, are said to be conclusive.[5]

4.10 Concerning the claim of a violation of article 14, paragraph 5, the State party submits that the evaluation of witnesses is chiefly the function of the trial court. The examination of factual issues is not within the remit of the Supreme Court, and it is not required to examine or contrast the oral and documentary evidence *de novo*. According to the State party, the evaluation of the credibility of witnesses and their testimony is a matter best undertaken by the trial court because of its unique opportunity to observe the witnesses. It further reiterates the trial court's summation in the author's case to the effect that the prosecution witnesses did not have any motive to falsely implicate, or testify against, the author.

Author's comments

5.1 By submission of 28 February 2004, the author reiterates his previous claims. With respect to the rule that an accused must make any objection to defects in his arrest before he enters his plea on arraignment, the author submits that he was not informed upon his arrest, during his detention or by the trial court of this rule and that the rule itself is contrary to his right to liberty.

5.2 As to the State party's argument that even if the arrest was illegal, this would not be sufficient to set aside a judgement rendered after a trial free from error, the author contests that the trial was free from such error. In support of his claim he refers to the following: the fact that the Supreme Court, unlike the trial court, chose not to rely on the extrajudicial confession; the fact that the expert's evidence at trial only claimed that it was possible that the alleged victim was raped; and that the Philippine Supreme Court has held in a number of cases that when the accused in a criminal case is unlawfully deprived of his right to liberty, the trial court is "ousted of jurisdiction" over that person.

5.3 As to his extrajudicial confession, the author states that the confession is the usual sworn statement prepared by the Philippine police and was not the result of a spontaneous statement, as asserted by the State party

Issues and proceedings before the Committee

Consideration of admissibility

6.1 Before considering any claim contained in a communication, the Human Rights Committee must, in accordance with rule 87 of its rules of procedure, decide whether or not it is admissible under the Optional Protocol to the Covenant.

6.2 The Committee has ascertained, in accordance with article 5, paragraph (a), of the Optional Protocol, that the same matter is not being examined under another international procedure of international investigation or settlement.

6.3 With respect to the claims that the lack of records concerning the circumstances of the author's arrest and the failure to afford him counsel of his choice after being arrested constitute a violation of article 14, paragraph 1, the Committee finds that these claims do not raise issues under article 14 but rather issues under article 9. Consequently, these claims are considered inadmissible *ratione materiae*, under article 3 of the Optional Protocol.

6.4 The Committee notes that the State party objects to the admissibility of the alleged violation of article 9 of the Covenant for non-exhaustion of domestic remedies, arguing that any alleged irregularity in his arrest should have been brought up prior to the author's arraignment. As it appears from an examination of the court proceedings that the author never raised any claim that his arrest was defective before the domestic authorities, the Committee considers that it is precluded from considering this issue at this stage. The Committee notes that the same circumstances apply to the author's claim of a violation of article 14, paragraph 3 (a) (para. 3.5) - failure to inform him of the charges against him. Consequently, these claims are inadmissible for non-exhaustion of domestic remedies under article 5, paragraph 2 (b), of the Optional Protocol.

6.5 With respect to the claim under article 14, paragraph 2, of the Covenant, the Committee considers that the author has failed to show how the Supreme Court's reliance on circumstantial evidence in affirming the conviction of the trial court violated his rights under this provision, or any other provision of the Covenant and therefore finds this part of the claim inadmissible for non-substantiation, pursuant to article 2 of the Optional Protocol.

6.6 With respect to the claim of a violation of article 14, paragraph 3 (g), the Committee considers that as the author himself admits to having had counsel assist him in preparing and making his confession, he has failed to substantiate his claim that he was forced to sign a confession. Furthermore, it is uncontested that the Supreme Court, when affirming the author's conviction, did not rely on his confession. Consequently, this claim is inadmissible under article 2 of the Optional Protocol.

6.7 As to the alleged violation of article 14, paragraph, 5 because of the way in which the Supreme Court interpreted the witnesses' evidence, the Committee notes that the author is primarily requesting the Committee to examine the evaluation of facts and evidence in his case. The Committee reiterates its jurisprudence that the evaluation of facts and evidence is best left for the courts of States parties to decide, unless the evaluation of facts and evidence was clearly arbitrary or amounted to a denial of justice. As the author has provided no evidence to demonstrate that the appellate courts' decisions were clearly arbitrary or amounted to a denial of justice, the Committee considers this claim inadmissible under article 2, of the Optional Protocol for non-substantiation for purposes of admissibility.

6.8 As to the claim under article 5 of the Covenant, the Committee finds that this provision does not give rise to any separate individual right. Thus, the claim is incompatible with the Covenant and inadmissible under article 3 of the Optional Protocol.

6.9 The Committee finds no other reason to consider the remaining claims raised by the author inadmissible and therefore proceeds to a consideration of the merits of the claims relating to articles 6; 5, paragraph 2; 7; 10, paragraph 1; and 14, paragraph 3 (b), of the Covenant.

Consideration of the merits

7.1 The Committee notes the author's claims of violations under articles 7 and 10, paragraph 1, on account of the fact that he would not be notified of his execution until dawn of the day in question, whereupon he would be executed within 8 hours and would have insufficient time to bid farewell to family members and organize his personal affairs. It further notes the State party's contention that the death sentence shall be carried out "not earlier than one (1) year nor later than eighteen (18) months after the judgement has become final and executory, without prejudice to the exercise by the President of his executive clemency powers at all times".[6] The Committee understands from the legislation that the author would have at least 1 year and at most 18 months, after the exhaustion of all available remedies, during which he may make arrangements to see members of his family prior to notification of the date of execution. It also notes that, under section 16 of the Republic Act No. 8177,[7] following notification of execution he would have approximately eight hours to finalize any personal matters and meet with members of his family The Committee reiterates its prior jurisprudence that the issue of a warrant for execution necessarily causes intense anguish to the individual concerned and is of the view that the State party should attempt to minimize this anguish as far as possible.[8] However, on the basis of the information provided, the Committee cannot find that the setting of the time of the execution of the author within eight hours after notification, considering that he would already have had at least one year following the exhaustion of domestic remedies and prior to notification to organize his personal affairs and meet with family members, would violate his rights under articles 7, and 10, paragraph 1.

7.2 Regarding the claim under article 6, paragraph 2, of the Covenant, the Committee observes that, in response to the State party's argument that the Committee's function is not to assess the constitutionality of a State party's law, its task is rather to determine the consistency with the Covenant of the particular claims brought before it.[9] The Committee notes from the judgements of both the Regional Trial Court and the Supreme Court, that the author was convicted of the complex crime of rape with homicide under article 335 of the Revised Penal Code, as amended by RA No. 7659, which provides that "When by reason or on the occasion of the rape, a homicide is committed, the penalty shall be death." Thus, the death penalty was imposed automatically by operation of article 335 of the Revised Penal Code, as amended. The Committee refers to its jurisprudence that the automatic and mandatory imposition of the death penalty constitutes an arbitrary deprivation of life, in violation of article 6, paragraph 1, of the Covenant, in circumstances where the death penalty is imposed without regard being able to be paid to the defendant's personal circumstances or the circumstances of the particular offence.[10] It follows that the automatic imposition of the death penalty in the author's case, by virtue of article 335 of the Revised Penal Code, as amended, violated his rights under article 6, paragraph 1, of the Covenant.

7.3 With respect to the claim of a violation of article 14, paragraph 3 (b), as the author was not granted sufficient time to prepare his defence and communicate with counsel, the Committee notes that the State party does not contest this claim. Since the author was only granted a few moments each day during the trial to communicate with counsel, the Committee finds a violation of article 14, paragraph 3 (b), of the Covenant. As the author's death sentence was affirmed after the conclusion of proceedings in which the requirements for a fair trial set out in article 14 of the Covenant were not met, it must be concluded that the author's right protected under article 6 has also been violated.

8. The Human Rights Committee, acting under article 5, paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights, is of the view that the facts before it disclose a violation of articles 6, paragraph 1, and 14, paragraph 3 (b), of the Covenant.

9. In accordance with article 2, paragraph 3 (a), of the Covenant, the State party is under an obligation to provide the author with an effective and appropriate remedy, including commutation of his death sentence. The State party is under an obligation to avoid similar violations in the future.

10. Bearing in mind that, by becoming a State party to the Optional Protocol, the State party has recognized the competence of the Committee to determine whether there has been a violation of the Covenant or not and that, pursuant to article 2 of the Covenant, the State party has undertaken to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the Covenant, the Committee wishes to receive from the State party, within 90 days, information about the measures taken to give effect to its Views. The State party is also requested to publish the Committee's Views.

[Adopted in English, French and Spanish, the English text being the original version. Subsequently to be issued also in Arabic, Chinese and Russian as part of the present report.]

Notes

[1] A 9-year-old girl whose body was found in the evening of 9 April 1997 in the vicinity of Balingasag.

[2] *People v. Echegaray* (GR No. 117472, judgement of 7 February 1997).

[3] *Alvarez v. Court of Appeals*, 359 SCRA 544 [2001].

[4] *People v. Amestuzo*, 361 SCRA 184 [2001].

[5] *People v. Castillo*, 289 SCRA 213 [1998].

[6] Section 1, Republic Act No. 8177.

[7] Section 16 of the Republic Act No. 8117 - "… During the interval between the notification and execution, the convict shall, as far as possible, be furnished such assistance as he may request in order to be attended in his last moments by a priest or minister of the religion he professes and to consult his lawyers, as well as in order to make a will and confer with members of his family or of persons in charge of the management of his business, of the administration of his property, or of the care of his descendants." However, on 8 March 2004, counsel forwarded the text of EP 200, pursuant to which the condemned prisoner may only meet with a priest and his lawyer but not with family members.

[8] *Pratt and Morgan v. Jamaica*, cases Nos. 210/1986 and 225/1987, Views adopted on 6 April 1989.

[9] *Carpo v. The Philippines*, case No. 1077/2002, Views adopted on 28 March 2003.

[10] *Thompson v. St. Vincent and The Grenadines*, case No. 806/1998, Views adopted on 18 October 2000; and *Kennedy v. Trinidad and Tobago*, case No. 845/1998, Views adopted on 26 March 2002.

APPENDIX

Individual opinion of Committee member Mr. Nisuke Ando

Reference is made to my individual opinion in the case *Carpo v. The Philippines*: communication No. 1077/2002.

(*Signed*): Nisuke Ando

[Adopted in English, French and Spanish, the English text being the original version. Subsequently to be issued also in Arabic, Chinese and Russian as part of the present report.]

Individual opinion of Committee member Ms. Christine Chanet

I reiterate my position concerning death row as expressed in my individual opinion on communication Nos. 270/1988 and 271/1988 (*Barrett v. Jamaica* and *Sutcliffe v. Jamaica*), Views dated 30 March 1992.

(*Signed*): Ms. Christine Chanet

[Adopted in English, French and Spanish, the French text being the original version. Subsequently to be issued also in Arabic, Chinese and Russian as part of the present report.]

X. DECISIONS OF THE HUMAN RIGHTS COMMITTEE DECLARING COMMUNICATIONS INADMISSIBLE UNDER THE OPTIONAL PROTOCOL TO THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS

A. Communication No. 697/1996, *Aponte Guzmán v. Colombia* (Decision adopted on 5 July 2004, eighty-first session)*

Submitted by:	Alfonso Aponte Guzmán (not represented by counsel)
Alleged victim:	The author, his wife and his children
State party:	Colombia
Date of communication:	3 November 1995 (initial submission)

The Human Rights Committee, established under article 28 of the International Covenant on Civil and Political Rights,

Meeting on 5 July 2004,

Adopts the following:

Decision on admissibility

1. The author of the communication dated 7 February 1996 is Alfonso Aponte Guzmán, a Colombian national resident in the United States of America. The author is also acting on behalf of his wife, Matilde Landazabal López, and his children, William Alfonso, Ricardo, Clara Milena and Víctor Adolfo Aponte Landazabal. He alleges violations of the International Covenant on Civil and Political Rights by Colombia. No articles are specifically invoked, but those at issue are articles 6, paragraph 1; 9, paragraph 1; 12; 17; and 23, paragraph 1, of the Covenant. The author is not represented by counsel.

The facts as submitted by the author

2.1 In 1993, the author was a witness in a trial in Ibagué, Colombia, in connection with an offence of extortion and kidnapping. He states that he had testified under special witness-protection legislation and that his identity should therefore not have been made public. However, on 2 November 1993, he received a telegram addressed to him at his home, from the coordinator of the Anti-Extortion and Kidnapping Unit of the Public Prosecutor's Office, containing a summons to give further evidence against the kidnap gang. He claims it was the Public Prosecutor's Office that revealed his identity, in violation of the special legislation on the protection of witnesses, thereby putting his and his family's lives at risk.

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* The following members of the Committee participated in the examination of the present communication: Mr. Abdelfattah Amor, Mr. Prafullachandra Natwarlal Bhagwati, Mr. Franco Depasquale, Mr. Maurice Glèlè Ahanhanzo, Mr. Walter Kälin, Mr. Ahmed Tawfik Khalil, Mr. Rajsoomer Lallah, Sir Nigel Rodley, Mr. Martin Scheinin, Mr. Ivan Shearer, Mr. Hipólito Solari Yrigoyen, Ms. Ruth Wedgwood and Mr. Roman Wieruszewski.

2.2 The author claims to have received anonymous threatening letters and telephone calls. The Office for the Protection of Victims and Witnesses gave him protection in Ibagué, providing judicial escorts from 6 September 1993 to 28 April 1994. It later assisted him in obtaining visas to enable him and his family to travel to the United States, which they did on 28 April 1994, leaving Bogotá for Miami.

2.3 The author claims that he and his family left Bogotá under the protection of the said legislation and with a commitment from the Colombian authorities to provide them with means of subsistence in the United States. He claims, however, that he received no financial support from the authorities for a long time, in spite of repeated requests, both through the Colombian Consulate in Miami and directly to the Prosecutor's Office.

2.4 The author claims that the authorities of his country denied him such assistance on the grounds that he had left Colombia voluntarily, and said that if he wished to avail himself of assistance under the special witness-protection legislation he would have to return to Colombia.

2.5 On 26 October 1995, the United States granted the author and his family asylum and issued the author with a work permit.

2.6 The author brought an action of protection for restitution of his rights and provision of protection. On 11 December 1996, his claim was rejected by the Administrative Tribunal of Cundinamarca.

2.7 Mr. Aponte appealed to the General Secretariat of the State Council, which revoked the Cundinamarca Administrative Tribunal judgement on 20 February 1997 and ruled instead that the author's rights should be protected; it ordered the Public Prosecutor's Office to provide full protection and social assistance to the Aponte Landazabal family, including back payment of expenses for their removal from the country and the costs of displacement and maintenance for as long as circumstances required. The Public Prosecutor's Office requested a review of this decision by the Constitutional Court.

The complaint

3.1 The author contends that the events described amount to violations of his rights under the Covenant, namely his rights to life, to security of person, and to family life. He claims that, as a result of the State party's failure to keep his identity as a witness secret, he received death threats that compelled him and his family to leave Colombia; and that in the United States he had no means of subsistence. He claims that the authorities, far from carrying out a diligent investigation into the incident, have done everything possible to cover it up and that no officials from the office that revealed his identity have been disciplined. Moreover, he claims that he has not received any compensation.

3.2 The author also claims a violation of the right to work, because on leaving Colombia he had to leave his business behind.

The State party's observations on admissibility

4.1 In its submission of 14 November 1996, the State party argues that the communication should be declared inadmissible, on the grounds that domestic remedies have not been exhausted.

4.2 The State party concedes that the author was the primary witness in an extortion and kidnapping case in his home town of Ibagué. However, it states that under resolution No. 0-663 of 1993, on the Programme to Protect and Assist Witnesses and Threatened Persons, the author should have been relocated within Colombia before being entitled to relocation outside the country. The author had refused internal relocation and consequently could not be relocated in the United States at the expense of the Colombian authorities. The State party further claims that it was Mr. Aponte's spontaneous decision to travel abroad, and that he only requested help in obtaining an entry visa for the United States and a ticket for himself. The State party claims that it never informed the United States Embassy in Bogotá that the author would be travelling at the request and expense of the Office for the Protection of Victims and Witnesses. It also states that, in a letter to the Public Prosecutor, the author expressed the hope that he would receive support from family members in Miami.

4.3 The State party denies that it failed to guarantee the Aponte family's life and security, since the document mentioning the author's identity was a purely internal one and thus did not put his life at risk. The State party contends that it is the author himself, with his series of complaints to national and international bodies, who has endangered his life by failing to exercise due caution.

4.4 In additional comments dated 8 November 1996, the State party reports that, by a decision of 19 December 1995, the Judicial Monitoring Division found that there had been no negligence on the part of the then Head of the Office for the Protection of Victims and Witnesses in the Public Prosecutor's Office, since there was no evidence that any outside party had knowledge of the telegram addressed to the author, and that the telegram did not, therefore, constitute a threat to the Aponte family. It adds that, according to the documents submitted, the author had by that time already received threats, and it was for that reason he was seeking the protection of the Office.

4.5 In its comments dated 15 October 1997, the State party informs the Committee that the State Council had ordered that the author and his family should be paid maintenance in the United States, as well as travel expenses. It points out that it has requested the Constitutional Court to review the case and that domestic remedies have consequently not been exhausted.

The author's comments on admissibility

5. On 10 October 1997, the author informed the Committee that, on 26 February 1997, the State Council had revoked the 11 December 1996 judgement of the Administrative Tribunal of Cundinamarca, denying him financial assistance. He claims that he brought an action for implementation of the judgement, but that, when it was not implemented, the Administrative Tribunal of Cundinamarca ordered the Public Prosecutor's Office, on 17 July 1997, to comply with the order. Furthermore, on 22 July 1997, the Office of the Programme of Protection and Assistance contacted him through the Colombian Consulate in Miami to transfer the first payment and inform him of the procedure to be followed in the future.

Committee's decision on admissibility

6.1 The Committee considered the admissibility of the communication on 18 March 1998.

6.2 The Committee took note of the State party's request that the communication should be declared inadmissible for failure to exhaust domestic remedies. It also noted, with respect to the allegation concerning the right to life, that the author brought several actions to clarify who was responsible for the divulgation of his identity which, he claims, forced him to flee the country. It considered that, in the circumstances, it must be concluded that Mr. Aponte had diligently pursued remedies aimed at establishing and clarifying his situation. More than three years after the events giving rise to the communication, those responsible for the incident had not been identified or disciplined. The Committee concluded that, in the circumstances, domestic remedies had been "unreasonably prolonged" within the meaning of article 5, paragraph 2 (b), of the Optional Protocol.

6.3 With respect to the author's allegations under articles 6, paragraph 1; 9, paragraph 1; 12; 17; and 23, paragraph 1, of the Covenant, the Committee considered that they had been sufficiently substantiated for purposes of admissibility and that they should accordingly be considered on their merits.

The State party's observations on the merits and the author's reply

7.1 In a written submission dated 4 November 1998, the State party maintains that the Public Prosecutor's Office ordered the author to be paid the sum of US$ 4,000 per month, in compliance with the instructions of the State Council of 26 February 1997. It further states that the amount had been determined on a unilateral and subjective basis, since the author had never allowed the question to be studied.

7.2 With regard to the alleged breach of confidentiality in respect of the author's identity, which supposedly placed his life in danger, the State party reports that a disciplinary inquiry was conducted against the official named by Mr. Aponte, and definitively closed by the Judicial Monitoring Division on 13 February 1996. According to the State party, the author has since submitted various applications and appeals, but that these were inadmissible since the case had been closed and no substantive aspects of the dispute remained to be addressed.

7.3 The State party reports that the persons against whom the author testified and whom he identified as having allegedly threatened him were found not guilty; the author's assistance was therefore unproductive, and the State party believes no threats were made. Furthermore, those who were found guilty were not the people whom the author identified.

7.4 The State party considers that Mr. Aponte may have been making use of the initial situation (alleged threats) to remain in the United States, and that he hopes for a favourable decision so that the United States authorities will extend his visa. It also recalls that it has suggested that the author return, and has offered to place him in the witness-protection programme in that event.

7.5 On 1 October 1999, the State party forwarded to the Committee a copy of the protection ruling handed down by the Administrative Tribunal of Cundinamarca. On 10 May 1999, the

Tribunal found that the circumstances that had warranted the payment of financial support to the author had changed: hence the decision of the Public Prosecutor's Office to discontinue payment was quite legal. The Division of the Tribunal that handed down the ruling found no proof that Mr. Aponte's life continued to be in danger; the Public Prosecutor's Office was thus unable to extend assistance and maintenance under the protection programme indefinitely. According to the Tribunal, the State Council ruling protecting the author's rights had clearly established that financial assistance should be provided only as long as circumstances required, and that, if those circumstances ceased to exist, the decision of the Public Prosecutor's Office to discontinue payments could therefore not be considered non-compliance.

7.6 The State party argues that the inquiry ordered by the Public Prosecutor's Office found that, during the time the author was being guarded by members of the Technical Investigation Unit (CTI), no real threats were made against his or his family's lives, and that in any case the author refused to allow his telephone to be monitored.

7.7 In a written submission of 2 August 1999, the author informed the Committee that he had received from the Public Prosecutor's Office the sum of US$ 4,000 per month over a seven-month period between September 1997 and April 1998; the payments had then ceased after seven months. He therefore brought an action for non-compliance against the Public Prosecutor's Office, in order to compel the Office to implement the maintenance order issued by the State Council. He also requested that the maintenance should be paid retroactively and that he should receive compensation for damages and harm for the "judicial error" of the Public Prosecutor's Office in failing to keep a witness' identity secret. In a submission dated 24 March 2003, the author reports that his claims were rejected by the Administrative Tribunal of Cundinamarca on 12 December 2002.

7.8 The author claims that he has been obliged to undergo psychiatric treatment as a result of the violations of his rights.

Issues and proceedings before the Committee

8.1 The Human Rights Committee has considered the present communication in the light of all the information made available to it by the parties, as provided for in article 5, paragraph 1, of the Optional Protocol.

8.2 Although the admissibility of the communication has already been considered, rule 93.5 of the Committee's rules of procedure allows for a review of the Committee's admissibility decision upon consideration of the merits. The Committee thus takes note of the State party's argument that the official identified by Mr. Aponte was the subject of a disciplinary inquiry that was definitively closed by the Judicial Monitoring Division on 13 February 1996. The Committee notes that, on 10 May 1999, the Administrative Tribunal of Cundinamarca found that the decision of the Public Prosecutor's Office to discontinue payments to the author could not be considered non-compliance since there was no evidence that the Aponte family were at continuing risk. It was this that led the Public Prosecutor's Office to discontinue support and maintenance under the protection and assistance programme. The Committee notes that the author adduces no evidence to the contrary. It also notes that Mr. Aponte was not prevented from working in the United States. Since it was those points that gave rise to the author's

complaints, and given that they are no longer valid, the Committee finds the author's communication is insufficiently substantiated for purposes of admissibility under article 2 of the Optional Protocol.

9. The Human Rights Committee therefore decides:

(a) That the communication is inadmissible under article 2 of the Optional Protocol;

(b) That this decision shall be communicated to the author and, for information purposes, to the State party.

[Adopted in English, French and Spanish, the Spanish text being the original version. Subsequently to be issued also in Arabic, Chinese and Russian as part of the present report.]

B. Communication No. 842/1998, *Romanov v. Ukraine*
(Decision adopted on 30 October 2003, seventy-ninth session)*

Submitted by:	Sergei Romanov (not represented by counsel)
Alleged victim:	The author
State party:	Ukraine
Date of communication:	11 August 1998 (initial submission)

The Human Rights Committee, established under article 28 of the International Covenant on Civil and Political Rights,

Meeting on 30 October 2003,

Adopts the following:

Decision on admissibility

1.1 The author of the communication is Sergei Nicholaiovich Romanov, a Russian citizen, born in 1976 and a resident of the Ukraine. He claims to be a victim of a violation by the Ukraine of articles 2, paragraphs 1 and 3 (a), 7, 9, paragraph 1, and 14, paragraphs 1, 2 and 5, of the Covenant. He is not represented by counsel.

1.2 The Optional Protocol entered into force for the Ukraine on 25 October 1991.

The facts as presented by the author

2.1 At the end of 1995 the author found himself in urgent need of money and devised a plan to rob one Mr. Maksimenko. Mr. Maksimenko was an acquaintance of a young woman with whom the author lived, Ms. Podlesnaya.[1] In November 1995 she visited Maksimenko's apartment and slipped a drug, clopheline, into Maksimenko's drink. Maksimenko fell asleep, whereupon Podlesnaya telephoned the author and let him into the apartment. With a hatchet found in the apartment, the author sought to break open a particular box. Unexpectedly, Maksimenko woke up, and the author, frightened, struck him with the hatchet, and Maksimenko fell to the floor. The author and Podlesnaya then stole property from the apartment. Maksimenko survived, and the author was arrested and committed to stand trial. He claims that at no time did he have any intention of killing Maksimenko.

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* The following members of the Committee participated in the examination of the present communication: Mr. Abdelfattah Amor, Mr. Nisuke Ando, Mr. Prafullachandra Natwarlal Bhagwati, Mr. Alfredo Castillero Hoyos, Mr. Franco Depasquale, Mr. Maurice Glèlè Ahanhanzo, Mr. Walter Kälin, Mr. Ahmed Tawfik Khalil, Mr. Rajsoomer Lallah, Mr. Rafael Rivas Posada, Sir Nigel Rodley, Mr. Martin Scheinin, Mr. Ivan Shearer, Mr. Hipólito Solari Yrigoyen, Ms. Ruth Wedgwood, Mr. Roman Wieruszewski and Mr. Maxwell Yalden.

2.2 On 30 October 1996 the author was convicted by the Kiev City Court of four offences under the Ukrainian Criminal Code. The Court found him guilty of attempted murder, aggravated robbery, attempted robbery, and incitement of a minor to commit a criminal act; he was sentenced to 15 years' imprisonment and confiscation of all personal property. In relation to the charge of attempted murder, the Court found that the dose of clopheline administered to the victim was life threatening, and that the author had intended to kill the victim when he struck Maksimenko with the hatchet. In regard to the latter, the Court found that the author had struck him several times on the head, causing serious injury, and that this occurred whilst the victim was unconscious after having been drugged. The author appealed his conviction for attempted murder to the Supreme Court of the Ukraine. The appeal was dismissed on 10 July 1997.

2.3 The author claims that the evidence, including physical and medical evidence regarding the victim's injuries, and the psychiatric evidence about the author's state of mind, does not support his conviction for attempted murder. Thus, the Court should not have deferred to the evidence of Podlesnaya in relation to the author's state of mind at the time he struck the victim. He claims Podlesnaya was hysterical after the drug was administered, and that her only knowledge of what happened during the assault with the hatchet came from the author himself. He claims that in any event, Podlesnaya later retracted her testimony to the effect that the author had intended to kill Maksimenko. She allegedly had only said such things because she was told the author was facing the death penalty, and that a similar fate might await her if she did not cooperate. The judgement of the First Instance Court, and on appeal, considered Podlesnaya's new testimony and rejected it as having been made at the behest of the author.

The complaint

3.1 The author contends that he was wrongly convicted of attempted murder, because he did not know that the clopheline given to the victim was life threatening, and did not know what he was doing at the time he struck the victim over the head. He disputes the Courts' findings of evidence, particularly the reliance on his accomplice's testimony, and states that he was not afforded a fair trial. He contends that the Court did not presume him innocent until proven guilty. He also claims that his arguments about the relevant evidence, and what really occurred in Maksimenko's apartment, were not considered by the Supreme Court of Ukraine, and that his right to have his conviction reviewed by a higher tribunal according to law was therefore violated. He claims that, given the circumstances, the State party violated articles 2, 7, 9 and 14 of the Covenant. He does not however link specific and concrete actions of the State party to the particular alleged violations of the Covenant.

3.2 The author alleges that various provisions of the Ukrainian Code of Criminal Procedure were breached in the course of his trial and the appeal, principally related to the Courts' alleged mishandling of his arguments and the relevant evidence.

The State party's observations on admissibility and merits

4.1 By note of 27 March 1999, the State party contends that the author's communication is groundless and therefore inadmissible. It states that the author's guilt was established by the author's own testimony, that of his accomplice, several other witnesses, as well as forensic and other evidence.

4.2 By note of 1 June 1999 the State party contested the merits of the author's communication. It reiterated that the author's claims, to the effect that he had no intention to kill the victim, were fully considered by the Ukrainian courts, in accordance with applicable law, and rejected.

Comments of the author on the State party's observations

5. In his comments on the State party's observations dated 24 August 1999, the author claims that the State party ignored his arguments regarding the evidence in his case. He reiterates his earlier contentions, namely that he was wrongly convicted. He claims that the State party's reply refers to the Courts' decisions, but that these do not reflect what actually occurred, and are unjust. He states that the State party ignored his submissions about the alleged procedural breaches of the trial court, and the failure of the Ukrainian Supreme Court to properly consider all of his arguments, a failure which he says breached Ukrainian criminal procedure laws.

Issues and proceedings before the Committee

6.1 Before considering any claims contained in a communication, the Human Rights Committee must, in accordance with article 87 of its rules of procedure, decide whether or not it is admissible under the Optional Protocol to the Covenant.

6.2 The Committee has ascertained that the same matter is not being examined under another procedure of international investigation or settlement for the purposes of article 5, paragraph 2 (a), of the Optional Protocol.

6.3 With regard to the author's claims under articles 2, 7 and 9 of the Covenant, the Committee considers that the author has not provided information sufficient to substantiate his allegations and accordingly declares them inadmissible under article 2 of the Optional Protocol.

6.4 In respect of the author's claims under article 14, paragraphs (1) and (2), the Committee considers that the subject matter of the allegations relates in substance to the evaluation of facts and evidence in the course of proceedings in the Ukrainian courts. The Committee recalls its jurisprudence and reiterates that it is generally not for itself, but for the courts of States parties, to review or to evaluate facts and evidence, unless it can be ascertained that the conduct of the trial or the evaluation of facts and evidence was manifestly arbitrary or amounted to a denial of justice.[2] The material before the Committee does not indicate that the conduct of the judicial proceedings in the author's case suffered from such deficiencies. Accordingly, the Committee considers the author's claims under article 14, paragraphs (1) and (2), to be inadmissible under article 3 of the Optional Protocol.

6.5 In relation to the author's right to have his conviction and sentence reviewed by a higher tribunal according to law, as provided for in article 14 (5), the Committee notes that an appellate procedure should, consistent with the Committee's jurisprudence, entail a full review of the conviction and sentence, together with due consideration of the case at first instance. In this regard, the Committee notes that, from the material provided, Ukrainian law requires the appeal court to consider all relevant evidence and arguments. It further appears from the judgement of the Ukrainian Supreme Court that it did consider the author's arguments, particularly in relation to his accomplice's evidence, and that it considered the author's version of events. The Supreme

Court found, based on its review of the decision at first instance, that there was no basis to allow the appeal. In light of the above, the Committee considers that the author has not substantiated his claims under article 14 (5), and that it is therefore inadmissible pursuant to article 2 of the Optional Protocol.

[Adopted in English, French and Spanish, the English text being the original version. Subsequently to be issued also in Arabic, Chinese and Russian as part of the present report.]

Notes

[1] Ms. Podlesnaya was a minor at this time.

[2] See for example communication No. 790/1997, *Cheban v. Russian Federation*, Views adopted on 24 July 1997.

C. Communication No. 870/1999, *H.S. v. Greece*
(Decision adopted on 27 July 2004, eighty-first session)*

Submitted by:	H.S. (not represented by counsel)
Alleged victim:	P.S.
State party:	Greece[1]
Date of initial communication:	23 March 1999 (initial submission)

The Human Rights Committee, established under article 28 of the International Covenant on Civil and Political Rights,

Meeting on 27 July 2004,

Adopts the following:

Decision on admissibility

1. The author of the communication is H.S., a Polish woman resident in Greece, claiming that her son P.S., a Polish citizen, born in 1979, is the victim of unspecified violations of the Covenant by Greece. She is not represented.

The facts as submitted by the author

2.1 The author submits that on 28 February 1999, her son, together with several other men, were searched by police at a bus stop. They found nothing on her son, but 15 grams of hashish on one of the other men. All were thereupon taken to the Menidhi police station in Athens.

2.2 On 1 March 1999, the men were each sentenced by the Athens Court of First Instance to 30 days' imprisonment, or a fine of 110,000 drachmas. The author submits that, although the fine was paid immediately, her son was kept in prison for another 18 days. She adds that at no stage was her son provided with a lawyer or a translator, and that he did not have access to medicine to treat his epilepsy.

2.3 In a further communication dated 6 June 1999, in response to questions from the Committee's secretariat, the author states that she approached the Ministry of the Interior, the Athens Police and the Attorney-General about her son's situation, but was informed that his conviction could not be reduced. She notes that her son was subsequently deported from Greece, but that no reasons were provided for his deportation, nor was the deportation ordered by a court. She states that, despite her requests, she was not provided with a copy of the deportation order, and that her son, who was 20 years old when he was deported, remains separated from his parents, and that he has no one to live with in Poland.

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* The following members of the Committee participated in the examination of the present communication: Mr. Abdelfattah Amor, Mr. Nisuke Ando, Mr. Prafullachandra Natwarlal Bhagwati, Ms. Christine Chanet, Mr. Franco Depasquale, Mr. Maurice Glèlè Ahanhanzo, Mr. Walter Kälin, Mr. Ahmed Tawfik Khalil, Mr. Rajsoomer Lallah, Mr. Rafael Rivas Posada, Sir Nigel Rodley, Mr. Martin Scheinin, Mr. Ivan Shearer, Mr. Hipólito Solari Yrigoyen, Ms. Ruth Wedgwood, Mr. Roman Wieruszewski and Mr. Maxwell Yalden.

The complaint

3. The author complains of violations of her son's right of access to a lawyer, right to an interpreter and medical treatment whilst in custody, and claims that he was unjustly deported from Greece. She does not invoke any articles of the Covenant.

The State party's submission

4.1 By note dated 2 February 2001, the State party submitted that her son entered Greece on 9 December 1995 on a visa allowing him to remain in the country for three months only, but that he did not leave the country upon expiry of the visa. At an unspecified time, he acquired a "Certificate" for a Limited Duration Residence Permit, which entitled him to remain in Greece pending consideration of his full application for a Limited Duration Residence Permit by the competent authorities.

4.2 On 28 February 1999, the author's son was arrested together with three other persons on drug procurement and possession charges. On 1 March 1999, the Athens Court of First Instance convicted the four and sentenced them to 30 days' imprisonment, but commuted the sentence to a fine of 1,500 drachmas per day of imprisonment.

4.3 Following the author's son's conviction, the Chief of the Branch of Police Security and Order ("the Branch Chief") rejected the application for a Limited Duration Residence Permit, which until then was still under consideration, on the grounds that he constituted a danger to public order and security. An order for his expulsion was then issued, which included a prohibition on him re-entering Greece for a period of five years. The Branch Chief, who has power to order the detention of a foreigner pending his deportation if he is considered to be a threat to public order, determined that the author's son should be detained pending his deportation. On 18 March 1999, he was expelled to Poland.

4.4 The State party contends that the communication is inadmissible as the author's son did not exhaust available domestic remedies, and because the allegations are unsubstantiated. It submits that the author's son did not lodge any appeal, either against his detention prior to deportation or the decision to expel him, even though he was aware that such rights existed. Greek law provides that aliens who are subject to a deportation order may appeal to the Minister of Public Order, and thereafter to the Council of State, which is the supreme administrative judicial instance in Greece. Further, the Minister for Public Order may review a decision to detain an alien pending deportation. The author's son chose not to resort to any of these avenues of redress.

4.5 The State party submits that the author's son was informed of these rights, and underlines that aliens who are detained pending deportation are provided with an information bulletin in different languages, including Polish, his mother language. This describes in detail their rights during detention, including the right to retain counsel, appeal the deportation decision, and seek medical assistance. The State party notes that the author's son speaks Greek, and therefore would not have required an interpreter.

4.6 The State party further submits that the author's son did not ask for the assistance of a lawyer. Despite this, during the proceedings before the Athens Court of First Instance in relation to the drug charges, he was assisted by a lawyer. In relation to the allegations regarding the author's son's health, the State party notes that aliens who are detained pending deportation have the right to request a medical examination by a police doctor or a private physician. As the author's son did not present any symptoms of illness, and did not advise the authorities that he suffered from epilepsy or otherwise required medical or pharmaceutical care, no medical assistance was provided to him.

4.7 In relation to the impact of the author's son's deportation on his family, the State party notes that he was already 16 when he arrived in Greece, and had spent only four years in the country at the time of his deportation, during which time he had not acquired residency. His parents, who are resident in Greece, had not acquired Greek citizenship. He had no spouse or children in Greece, and there were no apparent legal or other obstacles to his adapting himself to life in Poland where he had lived until the age of 16. All of these matters were taken into account by the Greek authorities.

Comments by the author on the State party's submissions

5.1 In her undated comments on the State party's submissions, the author states that she had still not received an explanation from the Greek authorities as to why her son was deported from Greece. She states that she had brought her son to Greece from Poland in 1995 after hearing about a new form of treatment for epilepsy that was available in Greece, and that, after two years on the waiting list, the treatment had improved her son's physical state. This treatment was interrupted by her son's deportation to Poland.

5.2 The author alleges, without providing any other details, that the officers who arrested her son were "drunk", and that her son was subjected to racism and discrimination by police officers at the Menidhi police station.

Issues and proceedings before the Committee

6.1 The Human Rights Committee has considered the present communication in the light of all the information made available to it by the parties, as required by article 5, paragraph 1, of the Optional Protocol to the Covenant.

6.2 The Committee has ascertained that the same matter is not being examined under another procedure of international investigation or settlement for the purposes of article 5, paragraph 2 (a), of the Optional Protocol.

6.3 The Committee has noted the State party's submissions that the author's son did not file any appeal against his detention or the deportation order. The State party has provided specific and detailed information both in relation to the availability of legal avenues of redress through which the author's son could have challenged his detention and deportation, and to the fact that he was made aware of these rights. None of this information has been contested by the author, nor has she demonstrated how she or her son were prevented from pursuing domestic remedies. In the circumstances, the Committee cannot conclude that available domestic remedies were exhausted. Accordingly, the Committee considers that the communication is inadmissible under article 5, paragraph (2) (b), of the Optional Protocol.

7. The Human Rights Committee therefore decides:

(a) The communication is inadmissible under article 5, paragraph 2 (b), of the Optional Protocol;

(b) The decision shall be communicated to the State party and to the author.

[Adopted in English, French and Spanish, the English text being the original version. Subsequently to be issued also in Arabic, Chinese and Russian as part of the present report.]

Note

[1] The Optional Protocol entered into force in relation to Greece on 5 August 1997.

D. Communication No. 874/1999, *Kuznetsov v. Russian Federation* (Decision adopted on 7 November 2003, seventy-ninth session)*

Submitted by:	Mr. Yuri Vladimirovich Kuznetsov (represented by counsel, Mr. Alexander G. Manov)
Alleged victim:	The author
State party:	Russian Federation
Date of communication:	16 May 1996 (initial submission)

The Human Rights Committee, established under article 28 of the International Covenant on Civil and Political Rights,

Meeting on 7 November 2003,

Adopts the following:

Decision on admissibility

1. The author of the communication is Mr. Yuri Kuznetsov, a Russian citizen born in 1964, who, at the time of submission of the communication, was detained in Ekaterinbourg (Russia). He claims to be a victim of violations by the Russian Federation[1] of article 14, paragraph 3 (b), (e) and (g), of the International Covenant on Civil and Political Rights. He is represented by counsel.

The facts, as submitted by the author

2.1 The author was a truck driver in a State-owned company in the city of Kachkanara (Russia). In the evening of 6 September 1990, he and a colleague, Mr. Fomkin, were drinking in the author's truck in the parking lot of the company. The same evening, they drove out to buy more alcohol; they met with a person called Alekseev and returned together to the company's yard, continuing to drink. After an argument with the author, Alekseev left the truck; later, the author drove the truck to the exit of the company's yard to give a lift to Fomkin. As he had no travel documents, a controller refused to let him leave the yard. The author parked the truck near the exit and, letting Fomkin sleep inside, walked home.

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* The following members of the Committee participated in the examination of the present communication: Mr. Abdelfattah Amor, Mr. Nisuke Ando, Mr. Prafullachandra Natwarlal Bhagwati, Mr. Alfredo Castillero Hoyos, Ms. Christine Chanet, Mr. Franco Depasquale, Mr. Maurice Glèlè Ahanhanzo, Mr. Walter Kälin, Mr. Ahmed Tawfik Khalil, Mr. Rafael Rivas Posada, Sir Nigel Rodley, Mr. Martin Scheinin, Mr. Ivan Shearer, Mr. Roman Wieruszewski and Mr. Maxwell Yalden.

2.2 In the morning, the author learned that Alekseev had been run over in the company's yard during the night and had died. The author expressed doubts as to whether he and Mr. Fomkin could have run over Alekseev, but Fomkin reassured him that it could not have been them.

2.3 The author was arrested on an unspecified date afterwards. On 8 October 1991, the City Court of Kanchkanara acquitted him. Following an appeal by Alekseev's widow and a prosecutor, the Sverdlovsk Regional Court, on 20 November 1991, annulled the decision of the City Court and returned the case for re-trial. On 17 February 1992, the Kachkanara City Court reaffirmed that the author's guilt was not proven. On 20 March 1992, the Sverdlovsk Regional Court again quashed this judgement, declaring it illegal and unfounded, and requesting another re-trial by the same court, but with a different composition. On 19 August 1992, the Nizhne-Turinsky City Court (Sverdlovsk Region) found the author guilty of the use of a technically defective truck, causing the death of Alekseev (article 211, part 2, of the Criminal Code) and sentenced him to four years in prison, with a five years' prohibition to drive a vehicle. This decision was confirmed by the Sverdlovsk Regional Court on 23 December 1992 and by the Supreme Court on 26 February 1993.

The claim

3. The author claims that he was unrepresented during the investigation, notwithstanding his request to be represented. During a cross-examination of Mr. Fomkin, on 16 April 1991, the author was allegedly put under pressure, threatened and beaten, to make him confess; Fomkin, also under pressure, urged the author, to accept his version of the facts, so as to avoid an indictment for murder. He further alleges that during the hearings in the Nizhne-Turinsky City Court, some 20 persons which could have testified to his innocence were not called to testify. In the author's opinion, all of the above constitutes a violation of article 14, paragraph 3 (b), (e), and (g), of the Covenant.

State party's observations

4. By note verbale of 16 November 1999, the State party argues that the Committee has no justifiable grounds to examine the communication, because the Supreme Court has already dealt with the case on three occasions, giving particularly close attention to the author's claim that he was convicted on the basis of unsound evidence and his right to defence was violated. The State party notes that no violations of the Criminal Procedure Code were found to have been committed during the investigation and the judicial proceedings. The Supreme Court found no reason to overturn the relevant courts' judgements. The State party adds that the author was released on parole on 23 August 1996.

Author's comments

5.1 By letter of 24 October 2001, counsel states that the State party ignored significant circumstances of the case: more than 20 witnesses - alleged to be "guarantors of Mr. Kuznetsov's innocence" - were not invited to testify in Court; Fomkin had denied the author's involvement in the crime during eight months, and changed his deposition only after his arrest, after he allegedly was threatened; the author was also put under pressure, threatened and beaten, to make him confess.

5.2 Counsel reiterates that the author had accepted Fomkin's version only because the investigator had promised to release him; also on the investigator's initiative, the author wrote a letter to his wife, but leaving it in the hands of the investigator, in which he admitted his guilt. Counsel recalls that the author was unrepresented during the investigation.

Consideration of the admissibility

6.1 Before considering any claim contained in a communication, the Human Rights Committee must, in accordance with rule 87 of its rules of procedure, decide whether or not the communication is admissible under the Optional Protocol to the Covenant.

6.2 The Committee notes that the same matter is not being examined under any other international procedure and that domestic remedies have been exhausted. The requirements of article 5, paragraphs 2 (a) and (b), of the Optional Protocol are thus met.

6.3 The Committee has noted the author's claim, under article 14, paragraph 3 (g), that he was threatened and beaten during the investigation to make him confess. In the absence of any other relevant information, from the author or details in substantiation of this claim, the Committee considers that the author has failed to substantiate, for purposes of admissibility, this part of the communication, which consequently is inadmissible under article 2 of the Optional Protocol.

6.4 The Committee has noted the claim under article 14, paragraph 3 (b), that the author did not have the assistance of a lawyer despite his request to this effect. This claim relates to the period of pre-trial detention, after which the author was twice acquitted. The author has not provided information as to how lack of representation at that time, prior to the entry into force of the Optional Protocol in respect of the State party, affected the third trial in April 1992 in a way that would constitute, if proven, a violation of article 14 (3) (b). Consequently, this part of the communication is inadmissible under articles 1 and 2 of the Optional Protocol.

6.5 As to the author's remaining claim under article 14, paragraph 3 (e), that more than 20 witnesses were not called to testify on his behalf before the Nizhne-Turinsky Court, the Committee notes that the author does not claim, in his case before the Committee, that he asked the witnesses in question to testify, or that they were refused by the Court, or otherwise prevented by the State party from testifying. Consequently, this part of the communication is outside the scope of article 14, paragraph 3 (e), and hence inadmissible under article 3, of the Optional Protocol.

7. Accordingly, the Human Rights Committee decides:

(a) That the communication is inadmissible under articles 1, 2 and 3, of the Optional Protocol to the Covenant;

(b) That this decision shall be communicated to the State party and to the authors of the communication.

[Adopted in English, French and Spanish, the English text being the original version. Subsequently to be issued also in Arabic, Chinese and Russian as part of the present report.]

Note

[1] The Covenant entered into force for the State party on 23 March 1976 and the Optional Protocol on 1 January 1992.

E. Communication No. 901/1999, *Laing v. Australia* (Decision adopted on 9 July 2004, eighty-first session)*

Submitted by:	Ms. Deborah Joy Laing (represented by counsel, Mr. Gavan Griffith)
Alleged victims:	Ms. Deborah Joy Laing, Jessica Joy Surgeon and Samuel Colin John Surgeon
State party:	Australia
Date of communication:	30 November 1999 (initial submission)

The Human Rights Committee, established under article 28 of the International Covenant on Civil and Political Rights,

Meeting on 9 July 2004,

Adopts the following:

Decision on admissibility

1. The author of the communication dated 30 November 1999, is Ms. Deborah Joy Laing (Ms. Laing). She submits the communication on behalf of herself and her two children Jessica Joy Surgeon and Samuel Surgeon. She claims that she is a victim of violations by Australia[1] of articles 2, paragraph 3, 7, 14, paragraph 1, 17, 23, paragraph 1, and 26, of the International Covenant on Civil and Political Rights (the Covenant); that Jessica is a victim of violations of articles 2, paragraph 3, 7, 12, paragraphs 1 and 4, 14, paragraph 1, 17 and 23, paragraph 1, and 24, paragraph 1; and that Samuel is a victim of violations of articles 2, paragraph 3, 7, 17, paragraph 1, 23, paragraph 1, and 24, paragraph 1, of the Covenant. They are represented by counsel.

1.2 On 10 December 1999, the Special Rapporteur on new communications rejected the author's request for interim measures.

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* The following members of the Committee participated in the examination of the present communication: Mr. Prafullachandra Natwarlal Bhagwati, Mr. Alfredo Castillero Hoyos, Ms. Christine Chanet, Mr. Franco Depasquale, Mr. Maurice Glèlè Ahanhanzo, Mr. Walter Kälin, Mr. Ahmed Tawfik Khalil, Mr. Rajsoomer Lallah, Mr. Rafael Rivas Posada, Sir Nigel Rodley, Mr. Martin Scheinin, Mr. Ivan Shearer, Mr. Hipólito Solari Yrigoyen, Ms. Ruth Wedgwood and Mr. Roman Wieruszewski.

The text of two individual opinions signed jointly by Mr. Prafullachandra Natwarlal Bhagwati and Mr. Walter Kälin and separately by Mr. Martin Scheinin is appended to the present document.

The facts as submitted

2.1 Ms. Laing married Lance Lynn Surgeon on 30 March 1991. Jessica was born on 9 November 1993, in the United States; she holds both Australian and American citizenship. The marriage disintegrated, and on 12 March 1994, Ms. Laing and Jessica, with Mr. Surgeon's consent, travelled to Australia where they remained until November 1994. They returned to the United States upon request from Mr. Surgeon, who had suffered a heart attack in the meanwhile.

2.2 On 12 January 1995, Ms. Laing and Jessica left the matrimonial home in the United States for Australia without the knowledge of Mr. Surgeon. On 17 January 1995, he filed an action for divorce in Georgia Superior Court. On 27 February 1995, the Court ordered Jessica's return to the State of Georgia, United States. In April and May 1995, the Georgia Superior Court heard a Rule Nisi application of Mr. Surgeon ex parte, without Ms. Laing's attendance, and ordered the dissolution of the marriage. It awarded the father "sole permanent custody" of Jessica, with no visitation rights for Ms. Laing until further order by a court of competent jurisdiction.

2.3 On 5 June 1995, Mr. Surgeon filed an application under the Hague Convention on the Civil Aspects of Child Abduction (the Hague Convention) to the United States Central Authority. That application was communicated to the Australian Central Authority, which initiated proceedings in the Family Court on 28 June 1995, seeking an order that Mr. Surgeon be permitted to remove Jessica from Australia to the United States. The Central Authority's application was listed for hearing on 5 September 1995, but the hearing dates were vacated and proceedings adjourned. On 22 September 1995, Ms. Laing's and Mr. Surgeon's son Samuel was born in Australia.

2.4 The application was heard before Justice O'Ryan in the Family Court of Australia on 2 and 5 February 1996. On 20 February 1996, he ordered that Jessica be returned to her father in the United States. Ms. Laing appealed to the Full Court of the Family Court, requesting that new evidence be heard. The appeal was heard on 3 and 4 July 1996. The Full Court refused to receive the new evidence, and dismissed the appeal on 10 October 1996.

2.5 Following the dismissal of the appeal, Ms. Laing went into hiding with her two children. They were located on 9 January 1998 and detained.

2.6 On 9 April 1998, Ms. Laing lodged an application for leave to appeal to the High Court of Australia. The High Court refused the application on 7 August 1998 as Ms. Laing had not appealed within the statutory time limit.

2.7 Ms. Laing then returned to the Full Court of the Family Court, and requested a reopening of the case. The Full Court of the Family Court reconstituted as a bench of five, heard the application to reopen the case on 27 and 28 August and 14 September, and dismissed the application on 9 February 1999, by a 3-2 majority.

2.8 At this point, Ms. Laing only had two remaining options: (a) to seek appeal to the High Court again, or (b) to apply to the Family Court and request that the Court issue a certificate to enable her to appeal to the High Court. The Family Court had issued only three such certificates since 1975; a certificate would only be issued if the case involves an important question of law or is of public interest. On 24 April 1999, the Family Court issued a certificate allowing the author to appeal again to the High Court, on the ground that the Full Court of the Family Court should reopen its decision to allow the application to be determined by reference to the proper and applicable law. Up to this point, Ms. Laing was not offered legal aid. However, she received a limited grant of legal aid for the appeal to the High Court. The High Court hearing started on 7 October 1999, on its final day on 18 November 1999, it dismissed the appeal without giving reasons. Ms. Laing therefore claims that domestic remedies have been exhausted.

2.9 From 1994, Ms. Laing has written letters and sent photographs and other information about the children to the father in the United States. She contends that he has shown no interest in the children, nor made any financial contribution for their maintenance, or visited them in Australia, or maintained telephone contact with them over the years.

The complaint

3.1 Ms. Laing claims that in violation of article 2, paragraph 3, of the Covenant, she does not have an adequate and effective remedy, since the Covenant is not incorporated into Australian domestic law in a manner which would enable her to enforce these rights. She submits that the Covenant is not part of Australian law and hence it has no legal effect upon the rights and duties of individuals.[2] While she has raised issues under the Covenant in her appeal to the High Court, she has not been provided with the Court's reasons in relation to this aspect of her appeal.

3.2 Ms. Laing claims that the forcible removal of her daughter Jessica, whom she would not see for many years, violates her rights under article 7. Neither she nor her son has the right to enter the United States, nor, given the current court orders, is there any possibility of their visiting Jessica, even if they were able to enter the United States. Ms. Laing has no means to pursue any further judicial action. She submits that such separation of a mother from her small child in the present circumstances amounts to cruel treatment in violation of article 7.

3.3 Ms. Laing claims that she was denied a fair trial, in violation of article 14, first in that the Family Court applied the incorrect law in its decision to remove Jessica from her custody. In the application to the Family Court in 1998 to reconsider the first appeal judgement, a majority of three judges, acknowledged that the First Appeal Court had applied the incorrect law, yet refused to reopen the matter. At the level of the High Court, it was conceded by all parties that the trial judge and the First Full Court had applied the incorrect law. However, on 18 November 1999, the High Court dismissed the appeal without giving reasons.

3.4 Secondly, Ms. Laing submits that the High Court did not provide reasons for its decision, in violation of article 14, paragraph 1. While the High Court decision implies that the removal orders for Jessica have immediate effect, the High Court indicated that the reasons for its decision would be provided later, thus leaving Ms. Laing without knowledge as to why the appeal failed before Jessica's return to the United States.

3.5 It is further claimed that in view of the delays in resolving the proceedings concerning Jessica, any interference of the author's home cannot not be said to be reasonable in terms of article 17, when measured against the irreparable damage and consequences to the author's family.

3.6 Ms. Laing claims that the removal of Jessica from her family impairs her enjoyment of family life, in violation of article 23, paragraph 1, in particular as the resolution of the case was seriously delayed.

3.7 She finally argues a violation of her rights under article 26, in that, while by operation of the Hague Convention the father's court costs in Australia were paid, no equivalent assistance was paid to the author. This is particularly serious, given that the divorce judgement granted the father all matrimonial property.

3.8 On behalf of Jessica, it is claimed that in violation of article 2, paragraph 3, of the Covenant, she does not have an effective remedy, since the Covenant is not incorporated into Australian domestic law in a manner which would enable her to assert her Covenant rights. She submits that the Covenant has no legal effect upon the rights and duties of individuals or Governments, and refers in this context to an Australian court case and to the Attorney-General's submission in the High Court proceedings in the present case.[3] Also, Jessica has not been able to present any submissions or arguments about her interests. While the Family Court appointed a separate representative for her, he could not play an active role in the proceedings, since he could not participate at the separate court hearing of Jessica.

3.9 It is claimed that Jessica will suffer severe psychological damage if she were to be removed from the only family she has known and the source of her emotional, physical and social well-being, as well as her school friends. Returning her to her father, who has played no active role in her life, and to a place where there are no arrangements in place for her immediate care nor schooling, would amount to cruel treatment, in violation of article 7 of the Covenant.

3.10 Jessica, as she is lawfully within Australian territory, she has a right, under article 12, paragraphs 1 and 4, to remain in the country. If she were to be returned to the United States, this right would be violated.

3.11 It is claimed that Jessica was denied a fair trial, in violation of article 14. First, she was denied the right to participate in the proceedings regarding her own rights and to challenge the decision to remove her from Australia. The inability to have her interests determined separately and independently of her mother's interests, has had a significant impact on Jessica's ability to have the merits of her case considered. For example, when the Second Full Court of the Family Court judges refused to reopen the case, considering the mother's default and conduct to be a determining factor against reopening of the case, Jessica's interest in having the case reopened was not considered separately.

3.12 Secondly, she was denied a fair trial in that the Family Court judge applied the incorrect law when deciding that she was to be returned. Counsel refers to the Convention on the Rights of the Child, which states that a child shall not be separated from his or her parents unless it is determined in accordance with applicable law and procedures that such separation is necessary for the best interest of the child. When Jessica's mother's final appeal to the High Court was dismissed, they were provided with no reasons for the decision.

3.13 The proposed forced removal of Jessica from her mother and brother would amount to arbitrary interference with her family and home, in violation of article 17 of the Covenant. Counsel refers to the Committee's Views in *Toonen v. Australia*.[4] It is contended that the delays in resolving the proceedings regarding Jessica's removal, entail that any interference with Jessica's home could not be considered reasonable when measured against the irreparable damage and consequences to her family. There is allegedly no legal avenue for Jessica to seek protection against this interference.

3.14 Finally, it is claimed, on behalf of Jessica, that the application of the Hague Convention in this case did not properly address the best interests of the child, which amounted to a violation of articles 23, paragraph 1, and 24, paragraph 1, of the Covenant. The removal of Jessica from her family would impair with her right to enjoyment of family life, since the strict application of the Hague Convention, operates to affect her interest adversely when the application and removal have not been dealt with expeditiously - that is at least within a year. It is also argued that the denial of access to her mother and brother in the event of removal would constitute a breach of article 10, paragraph 2, of the Convention on the Rights of the Child, and of article 24, paragraph 1, of the Covenant.

3.15 As to Samuel's rights, it is contended that, in violation of article 2, paragraphs 3 (a) and (b), the State party failed to provide him with an effective remedy to assert Covenant rights, as the Covenant is not justifiable in Australian law. Moreover, in the proceedings affecting his interests in that he risked a permanent separation from his sister, he was not able to participate. He has no independent standing in legal proceedings.

3.16 It is also claimed that Samuel's rights under article 7 would be violated, in that his sister's removal from the family would break the close bond between the two children and cause mental suffering to Samuel.

3.17 Jessica's imminent removal from her family, would amount to an arbitrary interference with Samuel's family and home, contrary to article 17.

3.18 It is argued that the removal of Jessica from her family would impair Samuel's enjoyment of family life, since he has no right to enter and remain in the United States or to visit his sister, and which would constitute a violation of articles 23 and 24 in this regard. Counsel submits that when determining a child's right, the Committee may have regard to article 3 of the Convention on the Rights of the Child providing that the best interests of the child shall be a primary consideration in all actions concerning children. By failing to take any steps that would enable Samuel to protect his rights, the State party violated article 24, paragraph 1, of the Covenant.

The State party's submission on the admissibility and merits of the communication

4.1 By note verbale of 8 February 2001, the State party made its submission on the admissibility and merits of the communication. It submits that the communication is inadmissible and that the Committee should dismiss it without consideration on the merits. In the alternative, should the Committee be of the view that the allegations are admissible, the State party submits that they should be dismissed as unfounded.

4.2 With regard to the authors' article 2 claim, the State party submits that there were no violations of other Covenant articles, and therefore no issue of a violation under article 2 of the Covenant arises. Consequently, this aspect of the communication should be dismissed as inadmissible. In any event, Australia does provide effective remedies for violations of Covenant rights. The provisions of international treaties to which Australia becomes a party do not become part of domestic law by virtue only of the formal acceptance of the treaty by Australia. This long-standing principle of Australian law was recognized by the High Court in *Minister for Immigration and Ethnic Affairs v. Teoh*. Australia submits that there are sufficient remedies available to enable Ms. Laing, Jessica and Samuel to assert their rights under the Covenant.

4.3 With regard to the authors' claim under article 7 that the return of Jessica to the United States will result in her being forcibly removed from her mother and brother, causing mental suffering, the State party submits that the allegations are inadmissible *ratione materiae*, as there is no evidence of infliction of any such mental sufferance by Australia.

4.4 Firstly, Australia pursues the lawful objective of returning an abducted child to the country of habitual residence in accordance with the Hague Convention, and to have her custody determined by the relevant and competent court. Ms. Laing was ordered by the Family Court to return to the United States as the proper forum to determine the issue of Jessica's custody. This was a bona fide attempt by Australia to give Jessica the opportunity to be reunited with her father and have the issue of custody finally determined. The actions of a State in fulfilling its obligations under international law cannot be interpreted as evidence of cruel, inhuman or degrading treatment.

4.5 Secondly, it is incorrect to assume that Jessica's return to the United States will conclusively result in her permanent removal from Australia, from Ms. Laing and from Samuel. There is a possibility that Jessica may be returned to her father, but this is a matter for United States courts to determine. There is no evidence of the infliction of deliberate or aggravated treatment by Australia in violation of article 7 of the Covenant.

4.6 Thirdly, Ms. Laing claims that she and Samuel may not be allowed to enter and remain in the United States. The State party submits that this is irrelevant for the purposes of establishing aggravated or deliberate treatment by Australia, in violation of article 7 of the Covenant. In any event, the Full Court of the Family Court sought to ensure that Ms. Laing and her children are permitted to enter and remain in the United States, by ordering that Mr. Surgeon support the visa application of Ms. Laing and refrain from prosecuting her for Jessica's abduction.

4.7 Furthermore, while Australia concedes that Ms. Laing, Jessica and Samuel may suffer some degree of mental strain as a result of overseas travel or the court proceedings in the United States, any such strain would not reach the severity of suffering required to find a violation of article 7. Australia therefore submits that the allegation of a breach of article 7 should be declared inadmissible as inconsistent with article 2 of the Optional Protocol.

4.8 In the alternative, the State party submits that the allegations ought to be dismissed as unfounded, since the applicants do not give any evidence of relevant treatment by Australia, nor that it would attain the minimum level of severity to constitute treatment in violation of article 7.

4.9 With regard to Ms. Laing's allegation under article 7, the State party submits that these matters are yet to be determined and therefore it cannot reasonably be maintained that they show that any relevant treatment has been or will be inflicted on her. Moreover, these matters will be determined by the United States and cannot be regarded as deliberate treatment by Australia.

In any event, there is no evidence to suggest that Ms. Laing would not be able to enter, or remain, in the United States. The United States recently extended the Public Benefit Parole category of visas to include abduction cases, as to allow an abducting parent to enter and remain in the United States so as to be able to participate in court proceedings.

4.10 With regard to Jessica, the State party submits that it does not intend to harm her in any way by returning her to the United States. Australia's actions therefore cannot constitute treatment relevant under article 7 of the Covenant. Moreover, the Full Court of the Family Court considered whether there was a grave risk that Jessica would be physically or psychologically harmed, or otherwise placed in an intolerable situation, as a result of her removal to the United States. It considered a report by a child psychologist on this point, and found that the alleged abrupt and permanent separation from her mother would cause Jessica some distress, but that she could adapt to the change and a new carer.

4.11 Finally, it is submitted that Samuel's allegation that he will be forcibly separated from his sister lacks merit for the reasons outlined in relation to admissibility of the claim.

4.12 The State party rejects Jessica's claim under article 12 as inadmissible pursuant to article 1 of the Optional Protocol, for inconsistency with the Covenant requirements to protect the family and provide special protection to the child (arts. 23 (1) and 24 (1) of the Covenant). It submits that Jessica's allegation incorrectly interprets article 12 (1) of the Covenant as implying the right to remain in Australia. However, The State party understands that article 12 (1) of the Covenant is concerned with the right to movement and residence within Australia. Jessica's allegation therefore raises no issue under the Covenant, nor does it substantiate any claim under article 12.

4.13 The State party submits that should the Committee find sufficient evidence to demonstrate a restriction by Australia of the rights in article 12 (1) of the Covenant, such a restriction would fall within the scope of restrictions permitted by article 12 (3). Jessica's return is necessary for the maintenance of public order, that is, the prevention of child abduction and regulation of return arrangements. Jessica's return to the United States is also in the interests of the protection of the family, consistent with article 23 (1) of the Covenant.

4.14 Furthermore, the State party submits that Jessica's allegation of a breach of article 12 (4) of the Covenant is without merit, since it is prohibited from arbitrarily depriving Jessica of her right to enter Australia. The Full Court of the Family Court of Australia considered whether Jessica has the right to remain in Australia. It found that she does have this right but that it has to be balanced with other rights. The judgement of the Full Court of the Family Court on 9 February 1998 found that to return Jessica to the United States on application of the Hague Convention, would not affect her right, as an Australian citizen, to live in Australia. In any event, there is no reason advanced as to why her basic right to live in Australia is any more significant or worthy of protection than her basic right to not be wrongfully removed from the United States.

4.15 With regard to the allegation that the Australian courts failed to determine the issue of Jessica's return to the United States fairly and in accordance with the proper law, the State party submits that the Full Court of the Family Court considered, in its appeal of 14 September 1998, that the lower court applied the wrong laws but that it did not affect the outcome of the case.

This decision was subsequently reviewed by another sitting of the Full Court of the Family Court and the High Court. To the extent that Ms. Laing's communication would require the Committee to assess the substantive, rather than the procedural of the decision of the High Court, the State party submits that this would require the Committee to exceed its proper functions under the Optional Protocol and that the allegations under article 14 are therefore incompatible with the Covenant. In this respect, it refers to the Committee's decision in *Maroufidou v. Sweden.*[5] Furthermore, it submits that the authors failed to provide sufficient evidence to substantiate a violation of that article of the Covenant, and in the alternative that the Committee should find the communication admissible, that it is without merits.

4.16 The State party submits that Jessica's allegation of a violation of article 14, paragraph 1, for failure to ensure separate representation in the court proceedings, is inadmissible for failure to raise an issue under the Covenant, since she is no victim of a violation of the Covenant. It submits that while an application was made to the Family Court for a representation on Jessica's behalf, it presented insufficient reasons for why a separate representation would be of benefit to her, taking into account that Australian courts consider the child's interests to be of paramount importance. In the alternative, the communication should be dismissed as unfounded.

4.17 Finally, with regard to the allegation under article 14, paragraph 1, that no reasons were provided by the High Court, the State party submits that the reasons for the High Court decision were published on 13 April 2000, and this allegation therefore is unsubstantiated.

4.18 With regard to the authors' allegation that Jessica's return to the United States is an arbitrary interference with the family and home by Australia, under article 17, the State party submits that the authors have not provided evidence of a violation, and thus fail to raise an issue under this provision. Moreover, they fail to demonstrate how they have been directly affected by the alleged lack of legal protection, and may therefore not be deemed victims of a Covenant violation.

4.19 In the alternative that the Committee finds the claim under article 17 admissible, the State party finds that it is without merits, since Jessica is being returned to the United States in accordance with Australia's international obligations under the Hague Convention to have the issue of Jessica's custody determined in the competent United States Court. Accordingly, the intervention is in accordance with the law and not arbitrary.

4.20 The State party submits that the allegation that Jessica's return to the United States constitutes a violation of the obligation to protect the family under article 23 (1), is incompatible with this provision of the Covenant. It refers to the preamble to the Hague Convention, where the signatory States affirm that they are "firmly convinced that the interests of the child are of paramount importance in matters relating to their custody", and that the Hague Convention was drafted "to protect children internationally from the harmful effects of their wrongful removal or retention ...". The fact that Australia is a party to this Convention is sufficient evidence of Australia's commitment to a protection of the family and, indeed, the child.

4.21 The State party adds that article 23 (1) requires that Australia protect the family as an institution and that Ms. Laing, Jessica and Samuel fail to provide any evidence to substantiate a claim that it has violated this obligation. The authors' allegation that applications for the return of a child made after one year are too late is deemed incorrect. In any event, the application for the return of Jessica was made within one year. The State party submits that the authors fail to establish that they are victims of any breach of article 23 (1) of the Covenant, and that the return of Jessica to the United States for her custody proceedings will take into account the rights of each family member.

4.22 On the merits, the State party submits that the courts' decision to return Jessica protects the interests of the individual family members and the interests of the community as a whole in the protection of families. The Full Court of the Family Court specified that Jessica's interests were of paramount importance, notwithstanding the unlawful actions of Ms. Laing. Jessica's father is included in the definition of family under article 23 (1); the return of Jessica to the United States to determine whether she will have access to her father is an active pursuit by Australia of the recognition of her right to enjoy family life.

4.23 On Jessica and Samuel's claim under article 24 (1) of the Covenant, the State party submits that the object of the Hague Convention proceedings in Australia was to determine the proper forum and not the issues of custody of, and access to, Jessica. It reiterates that the underlying principle of that Convention is the best interests of the child. Moreover, the fact that the United States Court may award custody to Jessica's father is not evidence of a violation of article 24 (1) of the Covenant. In relation to child abduction hearings, the Full Court of the Family Court has determined that it is in an abducted child's best interests to be returned to its habitual country of residence and to have issues of custody and access determined by the courts of that country. In the alternative that the Committee finds this claim admissible, the State party submits that it is unfounded.

4.24 The State party submits that Ms. Laing's claim under article 26 is inadmissible *ratione materiae* on three grounds; firstly, she has no claim under article 1 of the Covenant because she has not submitted evidence to the effect that she suffered financial discrimination; secondly, she has not substantiated her claim; and thirdly, in the event that the Committee is satisfied that the author has shown a difference in the treatment of Ms. Laing and Jessica's father based on one of the prohibited grounds in article 26, it submits that there is a failure to substantiate the assumption that this differentiation was not reasonable and objective and that the aim was not to achieve a purpose which is legitimate under the Covenant.

4.25 In this respect, it submits that Ms. Laing received legal or financial assistance from the Australian authorities in respect of the Hague Convention proceedings in Australia. She was granted legal aid by the New South Wales Legal Aid Commission in respect of the original hearing of the Hague Convention application in 1996, and the proceedings in 1999 before the Full Court of the Family Court. She was also granted financial assistance in respect of her subsequent appeal to the High Court. No financial contribution was required from her towards the cost of these proceedings; counsel had agreed to represent Ms. Laing in these proceedings on a pro bono basis, notwithstanding the provision of legal aid. In addition, the Full Court of the Family Court of Australia ordered on 9 April 1998, that Jessica's father pay costs relating to their return to the United States for Ms. Laing, Jessica and Samuel. In the alternative that the Committee finds this claim admissible, the State party submits that it should be dismissed as unfounded.

The author's comments

5.1 In his response of 23 April 2001 to the State party's submission, counsel submits that the State party is mistaken when stating that the Australian courts considered Jessica's interests to be of paramount importance. The operation of the Hague Convention and its implementing legislation, show that the child's best interest is not taken into account. Furthermore, he submits that the State party's assumption that Jessica's future custody remains to be finally determined by a United States court lacks foundation, since there are final orders of an American court awarding permanent custody to Jessica's father, with no visitation rights for the mother.

5.2 In respect of the State party's allegation that article 2 is not an autonomous right, counsel submits that the jurisprudence of the Committee may be reversed at any time, in light of further arguments regarding consideration of another case, and that recent jurisprudence of the Committee reveals a shift in the application of article 2, paragraph 3 of the Covenant towards providing a freestanding right for individuals. Moreover, in view of the particular circumstances that Australia has no Bill of Rights, no uniform constitutional, statutory or common law protections, which reflect the Covenant, leaves the authors with no effective remedies to safeguard their rights.

5.3 In respect of the claim under article 7 of the Covenant, counsel submits that the salient issue is whether a certain treatment which a State party is responsible for has the effect of being cruel. She considers that the forced separation of Jessica from her family constitutes cruel treatment because it has the effect of imposing severe suffering on Jessica and her family. Furthermore, the question of whether the treatment of a child is cruel requires an assessment of the child's particular circumstances, and in that regard a mere threat of such treatment is sufficient.

5.4 Counsel also submits that where the objectives of the Hague Convention for a speedy return of a child are not satisfied, the strict and inflexible application may be oppressive and unfair in certain circumstances. In the present case it took 13 months from the time of the unlawful removal until the first decision of an Australian court, and after 6 years, final resolution of the case remained outstanding.

5.5 Moreover, the psychiatric report submitted by the authors suggest that Jessica is sensitive to change and has difficulty with sleep and nightmares as a result of the temporary separation by police from her family in 1998. The State party has not challenged this evidence. Another report prepared for the Family Court when Jessica was two years old noted that "an abrupt and permanent separation from her mother would be associated with protest and extreme distress ...". Counsel submits that mental distress may constitute cruel treatment.

5.6 In relation to the State party's contention under article 12 of the Covenant, that Jessica has the right to be reunited with her father as a child and as an individual within a family, counsel submits that a claim concerning a family life must be real and not hypothetical, like in the case of Jessica.

5.7 Counsel reiterates the claim of a violation of article 14, paragraph 1. The State party's response that even if the proper law had been applied the result would have been the same, did not represent the view of second Full Court of the Family Court, but merely represents the view of one judge. Moreover, the views of the Chief Justice and another judge of that court considered that in the light of the correct law, the result may not have been the same.

5.8 In relation to the State party's contention that it is not the role of the Committee to review the facts, counsel acknowledges the Committee's established jurisprudence, but contends that the application of an incorrect law and the failure to correct the error makes the decisions of Jessica's removal "manifestly arbitrary". He adds that the authors' right to a fair trial includes a right to be provided with reasons at the time the orders were made.

5.9 In respect of the claim under article 17, counsel submits that interference with home in this case, is the interference with the authors' family arrangements and home life, including the extended family.

5.10 In respect of the claim under article 23 of the Covenant, counsel notes that the ECHR has constantly held that article 8 of the Convention includes a right for the parent to have measures taken with a view to his or her being reunited with the child, and an obligation for the national authorities to take such action. In Jessica's case, there are no family bonds between father and child, and the only family requiring protection is Jessica, Samuel, Ms. Laing, as well as the extended family in Australia,

5.11 With regard to the alleged discrimination of Ms. Laing, counsel submits that Mr. Surgeon was represented by the Central Authority, and that she only received a grant which covered a small proportion of the overall costs.

Supplementary submissions by the State party and the author

6.1 On 3 September 2001, the State party submitted further comments. With regard to counsel's contention that there is no factual foundation for Australia's assertion that American courts may give Ms. Laing custody of, and access to, Jessica, it submits that the custody order in favour of Mr. Surgeon, may, under the Georgia Code, be challenged and subsequently changed by the Court if there is a material change in the circumstances.

6.2 Furthermore, in relation to the authors' claim that Australia has no statutory or common law protections which reflect the terms of the Covenant, the State party submits that both legislation and the common law protect the rights in the Covenant. For example, under the *Human Rights and Equal Opportunity Commission Act 1986*, the Human Rights and Equal Opportunity Commission (the Commission) has the power to inquire into alleged Commonwealth violations of the rights set out in the Covenant.

6.3 On 7 November 2001, counsel submitted further comments and notes that the Commission does not provide an effective remedy, since its only power is to prepare a report on human rights violations to the Government. The Commission cannot issue enforceable decisions.

Issues and proceedings before the Committee

Consideration of admissibility

7.1 Before considering any claim contained in a communication, the Human Rights Committee must, in accordance with rule 87 of its rules of procedure, decide whether or not the communication is admissible under the Optional Protocol to the Covenant.

7.2 The Committee has ascertained that the same matter is not being examined under another procedure of international investigation or settlement for purposes of article 5, paragraph 2 (a) of the Optional Protocol.

7.3 As to the claims presented by the author on behalf of her daughter Jessica, the Committee notes that at the time of her removal from the United States Jessica was 14 months old, making her 10½ years old at the time of the adoption of the Committee's decision. Notwithstanding the consistent practice of the Committee that a custodial, or, for that matter, non-custodial, parent is entitled to represent his or her child under the Optional Protocol procedure without explicit authorization, the Committee points out that it is always for the author to substantiate that any claims made on behalf of a child represent the best interest of the child. In the current case, the author had the opportunity to raise any concerns related to Covenant rights in the proceedings before the national courts. While the Committee takes the position that the application of the Hague Convention in no way excludes the applicability of the Covenant it considers that the author has failed to substantiate, for purposes of admissibility, that the application of the Hague Convention would amount to a violation of Jessica's rights under the Covenant. Consequently, this part of the communication is inadmissible pursuant to article 2 of the Optional Protocol.

7.4 As to the alleged violations of the author's own rights, the Committee notes that the present situation, including its possible adverse effect on the enjoyment of Covenant rights by the author, is a result of her own decision to abduct her daughter Jessica in early 1995 from the United States to Australia and of her subsequent refusal to allow for the implementation of the Hague Convention for the purpose of letting the competent courts decide about the parents' custody and access rights in respect of Jessica. In the light of these considerations, the Committee finds that this part of the communication has not been substantiated, for purposes of admissibility and is, consequently, inadmissible pursuant to article 2 of the Optional Protocol.

7.5 As to the remaining part of the communication, related to the author's claims presented on behalf of the author's son Samuel who was born in September 1995 in Australia, the Committee notes that the exercise of Samuel's rights is not governed by the Hague Convention. Noting also that the decisions of the United States courts may potentially affect the possibilities of Samuel to maintain contact with his sister Jessica, the Committee in the light of its conclusions above nevertheless takes the view that the author has failed to substantiate, for purposes of admissibility, any claim that such effects would amount to a violation of the Covenant. Consequently, this part of the communication is inadmissible pursuant to article 2 of the Optional Protocol.

8. The Committee therefore decides:

(a) That the communication is inadmissible under article 2 of the Optional Protocol;

(b) That this decision shall be communicated to the State party and to the author.

[Adopted in English, French and Spanish, the English text being the original version. Subsequently to be issued also in Arabic, Chinese and Russian as part of the present report.]

Notes

[1] The Optional Protocol entered into force for Australia on 25 September 1991.

[2] *Minister for Immigration and Ethnic Affairs v. Teoh* (1995) 183 CLR 273, at p. 287 of the supporting documentation.

[3] *Minister for Immigration and Ethnic Affairs v. Teoh*, and *DJL v. The Central Authority*, in the High Court proceedings of 7 October 1999, paras. 48-50.

[4] Communication No. 488/1992, Views adopted on 31 March 1994, para. 6.4.

[5] Communication No. 58/1979, Views adopted on 9 April 1981, para. 10.1.

APPENDIX

Individual opinion of Committee members Mr. Prafullachandra Natwarlal Bhagwati and Mr. Walter Kälin (dissenting)

The majority of the members of the Committee have declared this communication inadmissible with regard to all alleged victims. While we concur in the inadmissibility decision regarding the author and her son, we dissent when it comes to her daughter Jessica. In paragraph 7.3 of the views adopted by the Committee, the majority considers that the author has failed to substantiate, for the purposes of admissibility, that the application of the Hague Convention on the Civil Aspects of Child Abduction (the Hague Convention) would amount to a violation of Jessica's rights under the Covenant. This opinion seems to rest on the assumption that the application of the Hague Convention is in the best interest of the child and therefore automatically compatible with the Covenant. We agree with this view in principle, but disagree as regards its application in the circumstances of the present case.

The purpose of the Hague Convention is to "secure the prompt return of children wrongfully removed" (art. 1) to the country from where they were abducted in order to reunite them with the parent who has been granted sole custody or to enable the courts of that country to determine the issue of custody without delay if this question is contentious. The Convention is thus based on the idea that it is in the best interest of the child to return to that country. This is certainly true if the return is executed within a relatively short period of time after the wrongful removal, but may be no longer the case if much time has elapsed since then. The Hague Convention recognizes this by allowing States not to return the child, inter alia if the child has spent a prolonged period of time abroad and is firmly settled there, if the return would cause serious harm and expose the child to serious dangers, or if the child is opposing return and is old and mature enough to take such a decision (arts. 12 and 13). While the Committee had not to examine the application of the Convention by Australia as such, it is relevant to note that this treaty accepts that return may not always safeguard the rights and the best interest of the child.

In the present case, the Committee has to decide whether upholding the decision by the competent Australian courts to return Jessica to the United States of America would violate her rights under the Covenant, in particular those under articles 17, 23 and 24 of the Covenant. As she has not yet been returned, the material point in time must be that of the Committee's consideration of the case, i.e. it is the present conditions which are decisive.

In this regard, we note that Jessica is almost 11 years old and is clearly opposing the envisaged return to her father. She has spent all of her life in Australia except the first four months after her birth and another three months after her first birthday. When she was approximately 3 years old, the Full Court of the Family Court of Australia dismissed the appeal of her mother in this case. Since then, almost eight years have passed without any full examination of the question as to whether the circumstances mentioned in articles 12 and 13 of the Hague Convention would apply in her case. This raises serious questions under the Covenant, in particular the following: Can the right of Jessica to lead a family life with her mother and brother still be trumped by the right of a distant father who was granted, more than a decade ago, sole permanent custody of the child, with no visitation rights of the mother? Would it be compatible with her right to such measures of protection as are required by her status as a minor to force her to live with a man who she most probably will battle in court and who she only knows as the person who wanted to separate her from her mother and brother as long as she can remember? These and similar questions are serious enough to warrant a thorough examination on the merits. Therefore, we would declare the communication admissible with regard to Jessica's claim to be a victim of a violation of articles 17, 23 and 24 of the Covenant.

(*Signed*): Mr. Prafullachandra Natwarlal Bhagwati

(*Signed*): Mr. Walter Kälin

[Adopted in English, French and Spanish, the English text being the original version. Subsequently to be issued also in Arabic, Chinese and Russian as part of the present report.]

Individual opinion of Committee member Mr. Martin Scheinin (concurring)

While I joined the majority in finding the communication inadmissible due to lack of substantiation in respect of all three alleged victims I feel a need to present additional reasons in respect of the claims made on behalf of Jessica Joy Surgeon, now aged 10 years.

First of all, I wish to make it clear from the outset that I see no problem in the Committee's approach to derive from article 2 of the Optional Protocol an admissibility condition of substantiation of any claims made of a violation of the Covenant. The reference to a "claim" of a violation in article 2 of the Optional Protocol must be understood as referring to a claim substantiated by relevant facts and legal arguments.

Secondly, when finding that Ms. Laing has not managed to substantiate her claims presented on behalf of Jessica, I attach significant importance on article 19 of the Hague Convention on Child Abduction, according to which a decision taken pursuant to the Convention on the return of a child "shall not be taken to be determination on the merits of any custody issue". As is reflected in paragraph 2.2 of the Committee's decision, the existing United States court decision of May 1995, awarding Mr. Surgeon sole custody of Jessica with no visitation rights for Ms. Laing was made "until further order by a court of competent jurisdiction". Hence, the case before the Committee is not about returning Jessica to the sole custody of Mr. Surgeon without any visiting rights afforded to Ms. Laing. The result of the application of the Hague Convention would have been in 1996, and still is, merely that Jessica is to be returned to the effective jurisdiction of United States courts so that they can decide about all maters related to custody and access rights. This is pointed out by the State party in paragraphs 4.4, 4.5, 4.19, 4.23 and 6.1 of the Committee's decision. It has not been substantiated, for purposes of admissibility, that the application of this principle would amount to a violation of Jessica's rights under the Covenant. This is my main reason for finding the claim presented on behalf of Jessica inadmissible. What follows hereafter, should be seen as supplementary reasons.

As is spelled out in paragraph 7.3 of the Committee's decision, it is its consistent practice that a parent is entitled to represent an under-aged child in the Optional Protocol proceedings without explicit written authorization. This approach also means that either one of the parents, custodial or non-custodial, is entitled to submit a communication on behalf of a child, alleging violations of his or her rights. While this approach means that a parent will always have formal standing to bring a case on behalf of his or her child, it is for the Committee to assess whether the custodial or non-custodial parent has managed to substantiate that he or she is representing the free will and the best interest of the child. For this reason it would always be best if the Committee could receive either a letter of authorization or another expression of the child's opinion whenever a child has reached an age where his or her opinion can be taken into account. In the current case, Jessica is approaching the age in which many jurisdictions attach legal significance to the freely expressed will of the child. For my assessment that Ms. Laing failed to substantiate the claims presented on behalf of Jessica, for purposes of admissibility, it was of some relevance that the Committee received no letter of authorization or other free and direct expression of Jessica's own opinion.

However, I attach more relevance to the fact that the Optional Protocol procedure always is between two parties, i.e. one or more individuals and a State party to the Optional Protocol. The requirement of substantiation relates to the claims made by the author, not merely to the issue whether the rights of a child have been violated. It may very well be that Jessica is a victim of violations by Australia of her rights under the Covenant. Those violations may result from the decisions made by Australian courts in the case, or from the non-implementation of those decisions, or from the possibility that the decisions would be implemented in the future by returning Jessica to the United States. The claim made by Ms. Laing on behalf of Jessica relates, at least primarily, to the third one of these options. It would be a part of her duty to substantiate the claim to demonstrate to the Committee that the implementation of the Court decisions taken several years ago is now likely or at least a real possibility, instead of mere speculation. In addressing the question whether such a claim is substantiated the Committee would need to keep in mind also the alternative scenario of a parent claiming a violation of the human rights of an abducted child due to the non-implementation of the decisions of a State party's own courts to return the child to the jurisdiction of the country from which he or she was removed. While there is no general solution to such conflicting human rights claims, this setting of potentially conflicting claims affects the application of the substantiation requirement as one of the admissibility conditions.

(*Signed*): Mr. Martin Scheinin

[Adopted in English, French and Spanish, the English text being the original version. Subsequently to be issued also in Arabic, Chinese and Russian as part of the present report.]

F. Communication No. 961/2000, *Everett v. Spain* (Decision adopted on 9 July 2004, eighty-first session)*

Submitted by:	Ronald Everett (represented by counsel, Mr. Bertelli Gálvez)
Alleged victim:	The author
State party:	Spain
Date of communication:	15 December 2000 (initial submission)

The Human Rights Committee, established under article 28 of the International Covenant on Civil and Political Rights,

Meeting on 9 July 2004,

Adopts the following:

Decision on admissibility

1. Communication dated 15 December 2000, supplemented on 1 February 2001, from Mr. Ronald Everett, a British citizen, who was extradited from Spain to the United Kingdom on 29 June 2001. He claims to be a victim of violations by Spain of article 9, paragraph 1; article 14, paragraphs 1 and 3 (b); and article 23, paragraph 1, of the Covenant. He is represented by counsel.

The facts as submitted by the author

2.1 The author arrived in Spain from the United Kingdom in 1983 and settled in Marbella with his wife. On 5 July 2000, he was arrested by the police pursuant to an extradition request from the United Kingdom based on a robbery alleged to have taken place in London in 1983, and on his alleged involvement in narcotics trafficking.

2.2 The author applied for provisional release. On 8 July 2000, Magistrates' Court No. 6 ruled that he should remain in provisional detention. The author appealed to the same court, arguing that he was a sick man and 70 years of age, and that he could not flee from justice because he had no identity documents. The court rejected his appeal in a judgement dated 20 July 2000. The author appealed to the First Criminal Division of the High Court, but his application was rejected on 10 October 2000. He also submitted an application for *amparo* to the Constitutional Court, but this was rejected on 16 November 2000.

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* The following members of the Committee participated in the examination of the present communication: Mr. Abdelfattah Amor, Mr. Prafullachandra Natwarlal Bhagwati, Ms. Christine Chanet, Mr. Franco Depasquale, Mr. Maurice Glèlè Ahanhanzo, Mr. Walter Kälin, Mr. Ahmed Tawfik Khalil, Mr. Rajsoomer Lallah, Mr. Rafael Rivas Posada, Mr. Martin Scheinin, Mr. Ivan Shearer, Mr. Hipólito Solari Yrigoyen, Ms. Ruth Wedgwood and Mr. Roman Wieruszewski.

2.3 The author's extradition was granted in a decision of the First Criminal Division dated 20 February 2001. The author submitted an appeal for reconsideration, which was rejected on 18 May 2001. The author again applied to the Constitutional Court for *amparo*, but his appeal was denied on 22 June 2001.

The complaint

3.1 The author alleges a violation of article 9, paragraph 1, of the Covenant. He asserts that, according to Constitutional Court judgement 128/1995, the only justification for provisional detention is to prevent the subject of an extradition request from absconding. According to the author, his detention during the extradition process was not warranted insofar as he had had no identity documents for more than 14 years - the United Kingdom having failed to renew his passport and the Spanish authorities having refused to regularize his residence status - which meant there was no risk that he would abscond. He further believes account should have been taken of the fact that his wife, also aged 70, was seriously ill. He states that neither Magistrates' Court No. 6 nor the First Criminal Division of the High Court responded to his counsel's contention that it was not possible for him to flee. The author also maintains that the measures provided for under article 8, paragraph 3, of the Law on Passive Extradition could have been applied to prevent him from absconding, but were not.

3.2 In his written submissions of 1 February, 5 March and 17 April 2001, the author alleges violations of article 14, paragraphs 1 and 3 (b), on the grounds that, in his view, he has been denied the right to an impartial tribunal and a properly prepared defence. He claims that he was refused access to the extradition file; and that he was informed only of the robbery charges and was told of the charges of conspiracy to import drugs into the United Kingdom only when he appeared before the court to make a statement, which meant he was deprived of the opportunity to prepare a defence. The author also claims a violation of his rights under article 14 inasmuch as the penalty for the offence was less than one year's imprisonment, which means that, under article 2, paragraph 1, of the European Convention on Extradition, and article 2, paragraph 1, of the Law on Passive Extradition, extradition may not be granted. He further claims that the United Kingdom requested his extradition solely for "conspiracy to fraudulently evade the prohibition on the import of drugs".

3.3 In the author's view, his rights under article 14, paragraph 3 (c) were also violated insofar as the proceedings were unreasonably protracted and the time limits established in the European Convention on Extradition were not observed. He points out that, according to article 16, paragraph 4, of the Convention, "[arrest] ... shall not, in any event, exceed 40 days from the date of its beginning", whereas he spent more than seven months in prison.

3.4 The author alleges a violation of article 14, paragraph 1, on the grounds that the court allowed the British authorities 30 days to provide supplementary information, which considerably delayed the extradition ruling. The author considers that the action of the State party in asking the United Kingdom to send supplementary information regarding the robbery amounted to an accusation and was out of order since it was a known fact that the statute of limitations applied to that offence.

3.5 The author further alleges a violation of article 23, paragraph 1, on the grounds that his extradition would leave his wife alone and in hospital, thereby violating his right to a family life.

State party's observations on admissibility and the merits

4.1 In its written submissions dated 15 January 2001, 19 June 2001 and 31 July 2003, the State party requests the Committee to find the communication inadmissible under article 5, paragraph 2, of the Optional Protocol. It argues that the author had stated in a submission to a Spanish court that his complaint had been submitted to the European Court of Human Rights.

4.2 The State party also claims that the communication is inadmissible under article 3 of the Optional Protocol, and argues that the author was deprived of his liberty in accordance with the procedure established in the Law on Passive Extradition (No. 4/1985), and with the relevant international treaties and agreements. It adds that his arrest was carried out under international detention orders,[1] for alleged involvement in serious crimes committed in the United Kingdom, and was ordered on the basis of properly reasoned judicial decisions. The State party claims that the author has in fact had every opportunity to exercise all his rights to a defence, insofar as all his claims have received repeated consideration by the highest Spanish courts.

4.3 The State party points out that the author was arrested and deprived of his liberty not in order to be tried for an offence, but with a view to extradition, a procedure that, in its view, is beyond the scope of article 14 of the Covenant. It explains that the remedy of reconsideration provided for by article 14, paragraph 2, of the Law on Passive Extradition need not meet the requirement for a second hearing before a higher tribunal in criminal cases, as provided for under article 14, paragraph 5, of the Covenant, but rather constitutes a remedy with devolutive effect and additional guarantees, whereby the court can review its decision in consultation with a greater number of judges.

4.4 As to the author's claim that he should not have been held in provisional detention since it was physically impossible for him to abscond, the State party maintains that the decision was taken on the grounds that there was a risk of escape and on the basis of other considerations that were duly argued and included in the court judgements. It further states that, according to the order of 8 July 2000, the fact that the author's papers were not in order was of no relevance to the decision on deprivation of liberty; and that account should also be taken of the fact that the decision was upheld in two subsequent judicial rulings. The State party further argues that, under article 2 of the Schengen Agreement, the author could have crossed the borders of European States without any requirement to produce papers of any kind. It also claims that the extradition papers state that the author had escaped from British justice using a false passport, a fact recalled in the Criminal Division judgement of 16 February 2001. The State party adds that it is not true to say that the author has no identity papers at all: the records show that his passport was confiscated along with a power of attorney made out to his lawyers, for which the author had had no difficulty in producing identification. The State party repeats that the courts have given a reasoned response to every one of the author's claims.

4.5 The State party asserts that, according to article 8 of the Law on Passive Extradition, the rules on provisional detention apply once the detainee has been brought before the court after 24 hours, and provided, as in this case, that the extradition request is duly submitted during the next 40 days. The State party claims that the time periods calculated by the author as a basis for his allegations of a violation of his right to be tried without undue delay are incorrect, since the law establishes only the time limits for charges to be brought and the maximum time before hearings are held, but does not rule out procedures such as requests for supplementary information or others that may be entailed by challenges or remedies initiated by the author himself. Furthermore, the additional information was requested by the court, in all impartiality, in order to establish an important fact relating to the statute of limitations on one of the offences for which extradition had been requested.

4.6 According to the State party, the author complained to the Supreme Court on 2 April 2001, accusing the President of the Criminal Division of the High Court and several other judges of breach of public trust in respect of his case; and filed another submission on 19 April 2001 challenging four of the judges comprising the full court of the Criminal Division that was to consider one of his appeals, on the grounds of "open hostility". The State party adds that the public prosecutor opposed the challenge, which he described as "reckless, constituting as it does a clear abuse of process and of procedural law". The Division ultimately rejected the challenges. The Criminal Division of the High Court found that the author lacked "any grounds whatsoever for believing that the delay [was] the result of a premeditated plan". The State party adds that, according to the Supreme Court's doctrine and case law, for a challenge under article 219, paragraph 9, to be heard, the complaint against the judge must be lodged before the proceedings open, and the challenge must be based on allegations of genuine offences or errors; moreover, the complaint must have been found admissible, which was not the case. In the event, says the State party, the author failed to demonstrate such alleged partiality and both the Constitutional Court and the full court of the Criminal Division of the High Court ruled on the allegation of a violation of his right to an impartial tribunal, which was an attempt on the part of the author to delay his extradition.

4.7 The State party reports that, in its decision of 20 February 2001, the High Court ruled that extradition to the United Kingdom: (a) could not be granted in respect of the robbery offence, by reason of the statute of limitations; and (b) could be granted in respect of the drug-trafficking offences. In response to the author's claim that extradition could not be granted because the offence was punishable by less than one year's imprisonment, the State party asserts that, under the provisions of the articles of the Criminal Code cited by the author, conspiracy to traffic in hashish carries a six-month to one-year prison sentence if the penalty is reduced by one category, or a three- to six-month sentence if it is reduced by two categories; however, the offence also involved conspiracy to traffic in cocaine, which carries a prison sentence of three to nine years. Thus the author is not correct in claiming that the threshold sentence for the granting of extradition was not attained.

4.8 In the State party's view, the claim of a violation of article 23, paragraph 1, is inadmissible because it is not duly substantiated. It argues that the author told the Criminal Division of the High Court that his wife had been admitted to hospital in the United Kingdom. It also points out that, while the deprivation of liberty may affect personal relationships in some respects, that does not in itself constitute a violation of any provision of the Covenant. The State party also says that, although the medical examination the author underwent revealed various age-related health problems, it also found that "the prognosis is in principle and at the present time favourable and no intervention or hospitalization is required".

4.9 The State party reminds the Committee that, according to article 7 of the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, States are required to provide the widest measure of mutual legal assistance in respect of such offences, and to facilitate the availability of persons in custody.

Author's comments on the State party's observations on admissibility and the merits

5.1 In his written submissions of 5 March, 16 April and 10 August 2001, the author contests the State party's observations: he claims it is not true that his case has been submitted to another international procedure of settlement, and he did not flee from the United Kingdom on a false passport, since he left London in late spring 1983 and entered Gibraltar on his own passport. In addition, since he is unable to prove his identity he would never dare to change his place of residence.

5.2 The author claims that the free movement of persons within the European Community does not mean there is no obligation to keep identity papers in order. He explains that the power of attorney referred to by the State party was granted in 1986, when his British passport was still valid.

5.3 The author points out that the State party has omitted to mention that he had an operation for a pituitary tumour and that he had to be admitted to the prison infirmary. The State party also failed to mention his wife's state of health: she suffers from Crohn's disease, which, in conjunction with her advanced age, means she needs constant care and attention. The author had been caring for her, and she had to go into hospital when he stopped doing so on his arrest.

5.4 The author reiterates that, according to article 2, paragraph 1, of the European Convention on Extradition and article 2, paragraph 1, of the Law on Passive Extradition, his extradition should not be granted. He claims that he was first charged with "conspiracy to fraudulently evade the prohibition on the import of drugs", and since the penalty for that offence is less than one year's imprisonment, the original charge was changed to a charge of having imported massive quantities of hashish from Spain to the United Kingdom on several occasions. In this regard, the author claims that he was held for three weeks beyond the permitted date, and that this was undoubtedly because the State party was trying to ensure that the case was taken by a judge who was prepared to comply with its wishes.

5.5 The author repeats his claim that, in accordance with articles 368, 373 and 701, paragraph 2, of the Spanish Criminal Code, the maximum penalty for conspiracy to traffic in hashish is a prison sentence of six months to one year minus a day, and that extradition should therefore never have been granted. He adds that, as stated in the report on which the extradition request was based, he had withdrawn from the plan to import cocaine.

5.6 The author repeats that he did not have an impartial tribunal, and that was why he challenged the judges trying his case. He claims that, under article 219.4 of the Judiciary (Organization) Act, judges against whom "complaints or challenges have been brought by any of the parties" are required to withdraw, but that his challenge was not allowed on the grounds that the complaint should first have been found admissible by the court hearing it. He also points out that the judges he challenged were members of the full court trying the appeal, and that therefore they could not give it an impartial hearing.

5.7 The author states that, according to Constitutional Court judgements 11/1983, 131/1994 and 141/1998, extradition proceedings are true trials.

Issues and proceedings before the Committee

6.1 Before considering any claims contained in a communication, the Human Rights Committee must, in accordance with rule 87 of its rules of procedure, decide whether or not it is admissible under the Optional Protocol to the Covenant.

6.2 The State party maintains that the author's communication should be found inadmissible under article 5, paragraph 2 (a), of the Optional Protocol, since Mr. Everett has stated in a submission to a Spanish court that his complaint had been submitted to the European Court of Human Rights. The author denies this. The Committee has noted that in June 1990 the European Commission of Human Rights found the complaint filed by the author against the United Kingdom to be inadmissible. It has therefore ascertained that the same matter has not been submitted to another international procedure of investigation or settlement. Accordingly, there is no impediment under article 5, paragraph 2 (a), of the Optional Protocol to consideration of the complaint.

6.3 The author alleges a violation of his right under article 9, paragraph 1, on the grounds that his provisional detention during the extradition proceedings was unwarranted, since there was no risk that he would abscond. In that regard, the State party maintains that the complaint should be found inadmissible under article 3 of the Optional Protocol, since the author was deprived of his liberty in accordance with the procedure established in the Law on Passive Extradition (No. 4/1985), and with the relevant international treaties and agreements. The State party adds that its decision was based on international detention orders[2] arising from the author's alleged involvement in serious offences on the territory of the requesting State. It also maintains that the detention was the subject of properly reasoned judicial decisions in which it had been determined that there was a risk of flight. The Committee notes that the measures provided for under article 8, paragraph 3, of the Law on Passive Extradition may be applied at the State party's discretion, and also that, as the State party points out, the author made use of the domestic remedies available to him, in all of which his complaint received consideration. The Committee finds that this part of the communication is not duly substantiated and is therefore inadmissible under article 2 of the Optional Protocol.

6.4 Recalling its earlier case law the Committee considers that although the Covenant does not require that extradition procedures be judicial in nature, extradition as such does not fall outside the protection of the Covenant. On the contrary, several provisions, including articles 6, 7, 9 and 13, are necessarily applicable in relation to extradition. Particularly, in cases where, as in the current one, the judiciary is involved in deciding about extradition, it must respect the principles of impartiality, fairness and equality, as enshrined in article 14, paragraph 1, and also reflected in article 13 of the Covenant. Nevertheless, the Committee considers that even when decided by a court the consideration of an extradition request does not amount to the determination of a criminal charge in the meaning of article 14. Consequently, those of the author's claims that relate to specific provisions in paragraphs 2 and 3 of article 14, are incompatible *ratione materiae* with the provisions in question and hence inadmissible pursuant to article 3 of the Optional Protocol. As to the remaining claim presented under article 14, namely that there was a violation of impartiality, the Committee considers that the author has not substantiated for purposes of admissibility, this part of his communication which is accordingly inadmissible pursuant to article 2 of the Optional Protocol irrespective of whether it is addressed under article 13 or 14 of the Covenant.

6.5 As to the complaint under article 23, paragraph 1, of the Covenant, the Committee notes the State party's contention that it is inadmissible on the grounds that it is not duly substantiated; and that, as it rightly points out, while deprivation of liberty may affect personal relationships to a certain extent, that does not in itself entail a violation of the Covenant. The Committee finds that this part of the communication is not sufficiently substantiated for the purposes of admissibility under article 2 of the Optional Protocol.

6.6 The Committee notes that the author alleges that the United Kingdom requested his extradition on the basis of an alleged conspiracy to fraudulently evade the prohibition on the import of drugs and that the initial charge considered by the State party was that of having imported quantities of hashish, for which the prison sentence was not more than one year, so that it was not appropriate to grant extradition. In the Committee's opinion, the correctness of the decision to extradite to the United Kingdom, which could be contested in the light of article 2, paragraph 1, of the European Convention on Extradition and the Law on Passive Extradition, is beyond the scope of any particular provision of the Covenant. For this reason, the Committee considers that this part of the communication is inadmissible *ratione materiae*.

7. Consequently, the Committee decides:

(a) That the communication is inadmissible under articles 2 and 3 of the Optional Protocol;

(b) To communicate this decision to the author and the State party.

[Adopted in English, French and Spanish, the Spanish text being the original version. Subsequently to be issued also in Arabic, Chinese and Russian as part of the present report.]

Notes

[1] The State party appears to refer to a request for provisional arrest in accordance with relevant international treaties.

[2] Ibid.

G. Communication No. 970/2001, *Fabrikant v. Canada* (Decision adopted on 6 November 2003, seventy-ninth session)*

Submitted by:	Valery I. Fabrikant (the author is not represented by counsel)
Alleged victim:	The author
State party:	Canada
Date of communication:	3 April 2000 (initial submission)

The Human Rights Committee, established under article 28 of the International Covenant on Civil and Political Rights,

Meeting on 6 November 2003,

Adopts the following:

Decision on admissibility

1. The author of the communication is Mr. Valery I. Fabrikant, a Canadian national, who has been serving a life sentence since 1993 for four counts of murder, at the Archambault federal penitentiary in Sainte-Anne-des-Plaines, Quebec. He claims to be a victim of a violation by Canada of articles 6, 7 and 10 of the International Covenant on Civil and Political Rights. He is not represented by counsel.

Facts as presented by the author

2.1 In May 1998, the author suffered a heart attack. Angiography showed that four of his arteries were blocked - two almost totally - and allegedly indicated the need for intervention. According to the author, there is no available treatment in Quebec, but there is in British Columbia.[1] He alleges that he has been in contact with a doctor there who is willing to perform the operation but that the prison authorities refuse to transfer him. He lodged a series of internal complaints which he says have been ignored.

2.2 On 23 August 1999, the author filed a motion in Federal Court seeking a mandatory injunction for the delivery of urgent medical care. On 14 September 1999, the application was dismissed. On 1 November 1999, the author claims that all his lawsuits in Federal Court (unspecified) were stayed. The author appealed the September decision to the Federal Court of Appeal, but discontinued his proceedings on 14 February 2000.

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* The following members of the Committee participated in the examination of the present communication: Mr. Nisuke Ando, Mr. Prafullachandra Natwarlal Bhagwati, Mr. Alfredo Castillero Hoyos, Mr. Franco Depasquale, Mr. Maurice Glèlè Ahanhanzo, Mr. Walter Kälin, Mr. Ahmed Tawfik Khalil, Mr. Rajsoomer Lallah, Mr. Rafael Rivas Posada, Sir Nigel Rodley, Mr. Martin Scheinin, Mr. Ivan Shearer, Mr. Hipólito Solari Yrigoyen and Mr. Roman Wieruszewski.

Pursuant to rule 84, 1 (a) of the Committee's rules of procedure, Mr. Maxwell Yalden did not participate in adoption of the decision.

2.3 On 23 February 2000, in the light of allegedly deteriorating health, the author applied to the Quebec Superior Court for urgent relief invoking the Canadian Charter of Fundamental Rights and Freedoms. On 29 February 2000, the motion was dismissed on the grounds of *res judicata*. On 16 June 2000, the Court of Appeal dismissed the author's appeal, on the grounds that the Superior Court had no jurisdiction. On 23 November 2000, the Supreme Court denied the author's application for leave to appeal.

The complaint

3. The author claims that the failure of the State party to provide him with necessary and available medical treatment threatens his right to life under article 6; he further contends that this communication also raises issues under articles 7 and 10 of the Covenant.

State party's submission on the admissibility and merits of the communication

4.1 By note verbale of 29 November 2001, the State party provided its submission on the admissibility and merits of the communication. It submits that the communication is inadmissible for lack of substantiation and incompatibility with the provisions of the Covenant.

4.2 On the facts, the State party submits that in 1991, before his incarceration, the author had a heart attack, and a procedure known as angioplasty was then performed on him. In May 1998, the author suffered a "myocardial infarction". He was treated by a cardiologist who recommended that the author undergo bypass surgery. The author refused to undergo this operation and insisted on having angioplasty. From 15 May 1998 up to the date of submission, the author was evaluated by at least 12 Canadian heart specialists who all concluded that angioplasty was not appropriate in his case and that he should be treated either by bypass surgery or by medication. Despite this overwhelming consensus of opinions, the author did not agree with the specialists and insisted on receiving angioplasty. He is currently being treated with medication. The State party submits that it has done everything possible to provide him with all necessary and appropriate medical care.

4.3 The State party submits that the author has pursued numerous cases against the Correctional Service of Canada (CSC) through the Canadian legal system, and against its employees, subcontracting physicians and physicians who have treated him, seeking an order from any court or physicians' disciplinary committee to transport or transfer him to British Columbia where he could allegedly receive the angioplasty that he demands, or sanctioning them for not doing so. In 2001 (date not provided), in *Attorney-General of Canada v. Fabrikant*, the Attorney-General requested the Quebec Superior Court to issue an injunction prohibiting the author from filing any further complaints to the applicable disciplinary bodies against any nurses, doctors or lawyers dealing with him. As of the date of the State party's response, no decision has yet been rendered by the Court.

4.4 On admissibility, the State party submits that no specific violations of the Covenant have been identified by the author. In his letter of 3 April 2000, he requests the Committee's "help" in receiving angioplasty. He claims that by being denied this particular treatment, he is effectively being placed on "death row." As evidence in support of his request for "help", the author submits the letters of three American doctors who affirmed, without having examined him, that it would be possible to perform angioplasty on him. It submits that he failed to refer to the opinions of more than 12 Canadian specialists who advised him that he was not a good candidate for angioplasty and that he would benefit more from medication or bypass surgery. Moreover, he failed to address the opinions of the courts that dismissed the same demand for help in receiving angioplasty, and of the provincial medical disciplinary body that determined that the medical care and advice he has received was provided in accordance with the highest professional standards.

4.5 The State party submits that in essence, the author is requesting the Committee to determine the factual medical issue whether he should receive angioplasty as opposed to other medical treatment. The Committee is being requested to choose between the conflicting medical opinions of numerous expert physicians, and is being asked to side with the physicians whose opinions are consistent with the author's preferred treatment.

4.6 In addition, the State party submits that the author has not asserted any connection between his demand for angioplasty and any potential violation of the Covenant. There has been no denial of medical treatment and in fact the author has repeatedly refused the treatment recommended to him. No Covenant provision could be interpreted as guaranteeing the author the medical treatment of his choice. The State party submits that the author's complaint has not been sufficiently substantiated and that therefore the communication should be declared to be inadmissible as not constituting a "claim" within the meaning of articles 1 and 2 of the Optional Protocol.

4.7 The State party also argues that the author's claims are incompatible *ratione materiae* with the provisions of the Covenant, under article 3 of the Optional Protocol. It submits that the request of a prisoner to receive medical treatment of his choice, in particular against overwhelming medical advice against that treatment, is not a "right" that is "set forth" in the Covenant.

4.8 On the merits, the State party submits that, although the author has not specified which Covenant rights he alleges have been violated, it presumes his claim would be assessed as an alleged violation of articles 7 and/or 10 of the Covenant. The State party argues that none of the doctors consulted in Canada is prepared to recommend or carry out angioplasty on the author, for the very reason that it is not in the author's interests. In the circumstances, the State party submits that this is not a case of denial of medical treatment but, rather, the State party acting in the author's best interest and providing him with the treatment recommended by numerous heart specialists.

4.9 The State party submits that the author relies on the statements of three American surgeons who claimed that it was possible to perform angioplasty on him, in support of his view that angioplasty is his best option. These surgeons based their opinions on a mere copy of his angiogram, and did not have the opportunity to examine him. The author is convinced that a Canadian physician, Dr. Hilton from British Columbia, is willing to perform angioplasty on him. In the author's perception, the only obstacle to his receiving angioplasty is the unwillingness of the CSC to transfer him from Quebec to British Columbia to receive the treatment. The State party submits that a review of the correspondence indicates that Dr. Hilton recommends surgery - and not angioplasty - but that he is willing to evaluate the author in his clinic to determine options for the best treatment for the author. In the State party's view, Dr. Hilton does not consider angioplasty to be in the author's best interests. Nor has he agreed to perform angioplasty on the author.

4.10 The State party submits that the author has repeatedly applied for a transfer to Williams Head Penitentiary, the nearest federal penitentiary to Victoria, British Columbia. On 25 October 1999, the receiving institution refused his request because of: (a) the author's refusal of treatment at Montreal's Heart Institute (which is one of the foremost medical facilities in Canada and the world) without adequate explanation; (b) the fact that Dr. Hilton had repeatedly advised against the treatment and considered that it would not be successful in the long run; and (c) the distance between Williams Head Penitentiary and the nearest hospital, and the physical stress of the proposed transfer. A subsequent request for a voluntary transfer and escorted temporary absence for medical reasons was denied on 23 May 2000, primarily because there was no change from the previous application.

4.11 The State party refers to the findings of the medical disciplinary board, after an action brought by the author against his physician, which found no fault with the treatment provided to the author and also refers to the evidence of an expert cardiologist who opined that the author had consistently received medical care and advice of the highest professional standards.

4.12 Finally, the State party argues that the fact that the author does not agree with the specialists' opinions does not constitute inhuman treatment or lack of respect for the author's inherent dignity which could be subsumed under articles 7 or 10, paragraph 1, of the Covenant.

Author's comments

5.1 On 2 August 2002, the author provided his comments on the State party's submission. He submits that he did not specify which articles of the Covenant he was alleging were violated as he thought that this would be obvious, namely a violation of article 6 of the Covenant due to a denial of medical care which threatened his life and violations of articles 7 and 10. He explains that he refused bypass surgery as those who recommended it were not surgeons themselves and he had received the opinion of two heart surgeons in Quebec who did not recommend it. He accuses both the judiciary and the "professional orders" in Canada of corruption.

5.2 The author explains that he is not asking the Committee to pass a medical judgement on which treatment is appropriate for him but argues that, assuming he has a doctor to perform a procedure and has the money to pay for it himself, he should have the same rights as ordinary citizens to such medical treatment as he considers most appropriate. For the author, the possibility that the procedure might be too risky to perform is a matter for the patient and the doctor ready to perform it to decide.

5.3 In addition, the author provides an update on his situation, stating that on 12 December 2001, he was transferred to British Columbia to receive angioplasty which was performed on 7 January 2002. Angioplasty was also performed on 19 July 2002. He claims that the fact that this procedure was eventually performed proves that his complaint against Canada is valid. He adds that he would be prepared to withdraw his complaint if the State party can find a doctor to open the remaining three blocked arteries (apparently, angioplasty only managed to open one artery) or grant him access to such a doctor if he should find one, and if it accepts that prisoners themselves and not prison doctors should be permitted to decide which medical procedure they undergo.

State party's first supplementary submission and the author's comments thereon

6.1 On 19 March 2002, the State party confirms that pursuant to the advice of another specialist, angioplasty was performed on the author on 7 January 2002. This specialist had stated that "It would be pertinent to repeat the coronary angiography in his [the author's] case in order to obtain answers to the patient's questions as well as those of the attending physicians. Although conservative medical treatment is often efficacious in controlling angina pectoris, it doesn't appear adequate for controlling the ischemia in this case, so that the possibility of the patient being at risk of death is real." He concluded: "I recommend a coronary angiography with dilation, if indicated, on an elective, intermediate-term basis (that is, within a few weeks)." Further to this recommendation, the author was transferred to British Columbia. Following the treatment, on 14 January 2002, Dr. Hilton, the surgeon who performed the operation wrote: "... I believe he is now safe." On 22 January 2002, the author's return to Quebec was approved.

6.2 The State party submits that as the author has now received the treatment that had formed the basis of his communication any alleged inconsistency with the Covenant has been corrected and the author cannot claim to be a victim of any violation of his rights under the Covenant. The issues raised, therefore, are moot and the communication should be declared inadmissible under articles 1 and 2 of the Optional Protocol. In the alternative, the State party submits that if the communication is held to be admissible, it has provided an effective remedy to any of the alleged violations of the Covenant.

6.3 In his response of 13 May 2002, the author denies that his claim is moot and contends that according to the doctor who performed the angioplasty it would have been more successful if the procedure had been carried out three years earlier.

State party's second supplementary submission and the author's comments thereon

7. In a further submission of 15 October 2002, the State party responds to the author's request to have additional angioplasty to open the remaining three blocked arteries and his request that prisoners, and not prison doctors, should be allowed to decide which medical procedure the prisoner will undergo. On the latter issue, the State party submits that Commissioner's Directive No. 803 entitles prisoners to refuse consent to recommended treatment, but does not entitle prisoners to the medical treatment of their choice, particularly when their choice is against the advice of the physicians responsible for their care. It reiterates that the demand of a prisoner to receive the medical treatment of his choice is not a right set forth in the Covenant and accordingly this demand is incompatible with the Covenant. On the former issue, it submits that on 19 July 2002, the author did receive a further angioplasty and a coronography. In the circumstances, the State party submits that the communication is inadmissible pursuant to articles 1 and 2 of the Optional Protocol.

8. On 24 January 2003, the author reaffirmed that his claim is not moot, even if he has had two angioplasties since January 2002,[2] as this procedure does not cure him - his heart disease is progressing and further angioplasties will be necessary. He claims that currently all cardiologists at the Cité de la Santé hospital are refusing to see him unless he is brought to the emergency

section. He claims that they are punishing him for filing complaints against the prison doctors. At the time of writing he claims that he needs another angioplasty which will have to be performed in British Columbia, but the prison doctors are again continuing to refuse to transfer him. He claims his life continues to be in danger and the prison authorities are refusing to provide medical care.

Issues and proceedings before the Committee

9.1 Before considering any claim contained in a communication, the Human Rights Committee must, in accordance with rule 87 of its rules of procedure, decide whether or not it is admissible under the Optional Protocol to the Covenant.

9.2 As to the requirement of exhaustion of domestic remedies, the Committee notes that the State party has not challenged the admissibility on this ground.

9.3 The Committee notes the author's claim that he is being denied medical treatment in being refused a transfer to British Columbia to undergo surgery known as "angioplasty". It observes that the author was transferred to British Columbia on three occasions for the purposes of undergoing angioplasty - a fact which the State party claims renders the communication moot. In his final comments to the Committee, the author claims that he needs angioplasty again and that he will require such treatment regularly in the future. Without considering the issue of whether a detainee has a right to choose or refuse a particular medical treatment, the Committee observes that at any rate the State party remains responsible for the life and well-being of its detainees, and that on at least three previous occasions the State party did transfer the author to British Columbia to undergo the requested procedure. In addition, the Committee notes that insufficient information has been provided to suggest that the authorities have ever failed to determine the most appropriate treatment in accordance with professional medical standards. Thus, on the basis of the information provided, the Committee finds that the author has failed to substantiate for purposes of admissibility his allegation that the State party has violated any articles of the Covenant in his regard. The communication is therefore inadmissible under article 2 of the Optional Protocol.

10. The Human Rights Committee therefore decides that:

(a) The communication is inadmissible under article 2 of the Optional Protocol;

(b) This decision be communicated to the author and to the State party.

[Adopted in English, French and Spanish, the English text being the original version. Subsequently to be issued also in Arabic, Chinese and Russian as part of the present report.]

Notes

[1] The author provides letters from three surgeons who claim that on the basis of his medical chart they would be able to operate and a letter from another doctor with a different opinion.

[2] The author does not provide the dates.

H. Communication No. 977/2001, *Brandsma v. The Netherlands* (Decision adopted on 1 April 2004, eightieth session)*

Submitted by:	R.P.C.W.M. Brandsma (represented by counsel, Mr. M.W.C. Feteris)
Alleged victim:	The author
State party:	The Netherlands
Date of communication:	30 October 2000 (initial submission)

The Human Rights Committee, established under article 28 of the International Covenant on Civil and Political Rights,

Meeting on 1 April 2004,

Having concluded its consideration of communication No. 977/2001, submitted to the Human Rights Committee on behalf of R.P.C.W.M. Brandsma under the Optional Protocol to the International Covenant on Civil and Political Rights,

Having taken into account all written information made available to it by the author of the communication, and the State party,

Adopts the following:

Decision on admissibility

1. The author of the communication is R.P.C.W.M. Brandsma, a Dutch national born on 14 October 1961. He claims to be a victim of a violation of article 26 of the International Covenant on Civil and Political Rights by the Netherlands. He is represented by counsel.

The facts as described by the author

2.1 In 1998, the author worked as a civil servant both for the Ministry of Finance and for the University of Leiden. He was given holiday supplementary payment of Fl. 9,166 in addition to his normal wages during the holidays which totalled Fl. 11,894. These amounts of holiday payments were fully subject to the imposition of income tax, in conformity with the Dutch laws and regulations.

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* The following members of the Committee participated in the examination of the present communication: Mr. Nisuke Ando, Mr. Prafullachandra Natwarlal Bhagwati, Mr. Alfredo Castillero Hoyos, Mr. Franco Depasquale, Mr. Maurice Glèlè Ahanhanzo, Mr. Walter Kälin, Mr. Ahmed Tawfik Khalil, Mr. Rafael Rivas Posada, Sir Nigel Rodley, Mr. Martin Scheinin, Mr. Ivan Shearer, Mr. Hipólito Solari Yrigoyen, Ms. Ruth Wedgwood, Mr. Roman Wieruszewski and Mr. Maxwell Yalden.

2.2 The author states that, like him, most employees in the Netherlands receive their holiday payments directly from their employer. In some sectors of industry, notably in the building sector, however, employees receive holiday vouchers. These are entitlements that can be cashed in, at the time of vacation, at a foundation that is funded with contributions from the employers. The value of these vouchers is taxed at the same time as the monthly or weekly salary, although the employees receive the actual payment at a later stage.

2.3 During the period before the tax reform of 1990, a technical complication in the calculation of wage taxes would have led to the holiday vouchers being taxed at a higher rate than normal holiday payments. In order to compensate for this disadvantage, holiday vouchers were taxed at only a percentage of their normal value (75 per cent in 1950, 50 per cent in 1953 and 60 per cent in 1969). It is stated that the system led to criticism from fiscal experts, who claimed that the undervaluation of the vouchers privileged employees receiving holiday payments through vouchers.

2.4 In 1986, a committee of experts (the Oort-committee) advised the Government about simplification of the tax system. This new system would take away the higher tax rate for the holiday voucher payments and the committee advised therefore to tax the vouchers at 100 per cent. However, the Social Economic Council, a permanent advisory body to the Government, was of the opinion that this would lead to increased expense for the employers and a decrease in net wages for the employees and, thus, would be opposed by those concerned. Following this advice, and after consultations with the Labour Foundation, the official consultative forum between organizations of employers and employees, a tax reform package was presented, abolishing the tax disadvantage of the holiday vouchers and at the same time raising their valuation to 75 per cent. This proposal was accepted by Parliament and became effective on 1 January 1990.

2.5 In 1996, further tax reforms were proposed. After consultations with the organizations of employers and employees new rules were issued, effective 1 January 1999, which will gradually abolish the valuation of the holiday vouchers. From 1999 onwards, their valuation will increase by 2.5 per cent every year, reaching 92.5 per cent in 2005. As of 2006, it is proposed to tax the vouchers against their effective value (estimated at around 97.5 per cent because of the discrepancy between the moment of taxation of the vouchers and the moment of effective payment).

The complaint

3.1 The author complains that he is a victim of a violation of article 26 of the Covenant, because he had to pay taxes over 100 per cent of his holiday payments in 1998 whereas those employees who were being paid their holiday payments through vouchers were taxed at 75 per cent of their payments.

3.2 The author states that he has not objected to the tax assessment or exhausted domestic remedies in this respect, in the light of the Supreme Court's judgement of 16 June 1999 in a similar case, where the Court decided that the difference in taxation did not constitute unlawful discrimination. According to the author, the application of domestic remedies would thus not have any prospect of success.

3.3 The author argues that although his holiday payments are not identical to the holiday payments through vouchers, the two situations are so similar that unequal treatment cannot be justified. He argues that after the tax reform of 1990 no relevant distinction between the two systems of holiday payments exists. Only the difference between the moment of taxation and the moment of payment in the case of holiday vouchers would be a relevant distinction, but the estimated difference is said to be only around 2 per cent and does not justify a difference in the taxable payment of 25 per cent.

3.4 The author further remarks that the group of taxpayers who are entitled to holiday vouchers are mainly men, and stresses that the present system amounts to indirect distinction on the basis of sex prohibited by article 26.

3.5 Concerning the opposition against full taxation by employers and employees in the sectors where the holiday vouchers are used, the author argues that the opposition may be an explanation for the delay in providing equal treatment, but does not provide any justification for continuing the favourable treatment of a small group of taxpayers. He states that measures which have broad support in society can nevertheless be discriminatory and therefore violate the Covenant. As to the validity of the arguments used by the social partners, the author argues that the abolition of a privilege leads automatically to a financial disadvantage of the persons who used to enjoy the privilege. This argument can thus not be used to maintain privileges.

3.6 The author further argues that the gradual abolition of the privilege is not justifiable as the State party is under an unconditional obligation to secure the substantive Covenant rights. Even if some form of gradual change after 1990 can be accepted, it cannot be justified that the difference in taxation was still unchanged in 1998, eight years after the difference in tax basis between the two systems had been abolished.

3.7 If the Committee were to decide that the holiday vouchers and normal holiday payments are not similar payments that require equal treatment, the author argues that the difference in tax base of 25 per cent is completely disproportionate in relation to the actual time difference between the moments of taxation, and thus still amounts to discrimination.

3.8 On the basis of the above, the author requests the Committee to rule that there has been discrimination in his case and that he should be retroactively granted the privileged treatment enjoyed by the others, and be compensated for the tax that he has paid additionally.

State party's observations

4.1 By submission of 23 November 2001, the State party refers to a comparable case submitted by the author's counsel on behalf of another client to the European Court of Human Rights, which was declared inadmissible by the Court on 23 October 2000. According to the State party, the claims of discrimination of the case are the same as in the present case. Indeed, the author has referred to the Supreme Court's judgement in this case as a justification for the non-exhaustion of domestic remedies. The State party agrees in this context that it was reasonable for the author to expect that domestic remedies would not have given him any relief.

4.2 The State party refers to a letter to counsel from the registry of the European Court of Human Rights, dated 7 September 2000, in which it explains the obstacles to the admissibility of the case, referring to the Court's case law from which follows that States parties have a wide margin of appreciation in the implementation of social and economic policies, in assessing when and to what extent differences in otherwise similar situations justify a different treatment in law. In its decision declaring the case inadmissible, the Court found that the matters complained of did not disclose any appearance of a violation of the rights and freedoms set out in the European Convention.

4.3 The State party recalls that it has not entered a reservation to article 5, paragraph 2 (a), of the Optional Protocol vis-à-vis matters that have already been decided by the European Court because it was believed that widespread similar reservations could undermine the universal system for the protection of individual human rights. The State party requests the Committee however to avoid opposing rulings by international supervisory bodies and thus to share the conclusion of the European Court that there has been no violation of the principle of non-discrimination. In this connection, the State party argues that the difference in scope between article 14 of the European Convention and article 26 of the Covenant does not play a role in the present case, since the combined scope of article 14 and article 1 of the First Protocol is comparable to the scope of article 26 of the Covenant.

4.4 On the facts of the case, the State party explains that in the construction industry and related sectors, it has been the custom that workers are not paid while they are on holiday. Instead, they receive holiday vouchers from their various employers for each day they work, which can be exchanged for cash at a central fund in the holiday period. Out of the total of about 5 million employees in the Netherlands who have some kind of holiday entitlement, roughly 330,000 are entitled to holiday vouchers. The author is therefore in the same position as about 93.4 per cent of the total number of employees with holiday entitlement.

4.5 The State party explains that the difference in treatment arose from the need to prevent the situation where those who received holiday vouchers were taxed more heavily than recipients of holiday pay. It further explains that after the simplification of the taxation system in 1990, the assessment of the value of holiday vouchers was raised to 75 per cent. Although a rise to 100 per cent had been proposed originally, it was felt that this would confront employees concerned with a sudden, substantial drop in income. After consultation, a rate of 75 per cent was therefore agreed as a temporary compromise. Further consultations finally led to the gradual abolition of the special rate as of 1 January 2006.

4.6 On the merits, the State party refers to the courts' finding that holiday pay and holiday vouchers are unequal cases, both de facto and de jure. The Supreme Court noted in its judgement of 16 June 1999 that it was not the existence of the differences that was contested but only their weight. It then concluded that an objective and reasonable justification existed for the unequal treatment given that the Government had compelling reasons of a social, economic and political nature for not immediately raising the rate of the vouchers to their market value. The State party explains that the Supreme Court explicitly examines cases in the light of international conventions, including the Covenant.

4.7 The State party reiterates that weighty social, economic and political considerations underlie the different tax regimes applied to holiday pay and holiday vouchers. It acknowledges that the difference in treatment should be abolished but affirms that this has to be done with caution. It suggests that the sudden denial to individuals of what were in the past undisputed rights, with reference to the principle of equality before the law, may be at odds with other human rights, in particular the right to the protection of property. The State party argues that this applies all the more in the present case since in contrast to the author the recipients of holiday vouchers belong to the lowest salary category.

4.8 The State party concludes that the communication (a) does not involve equal cases and (b) does not involve a manifest disproportionate treatment of unequal cases which could be classified as a violation of article 26 of the Covenant.

The author's comments

5.1 By letter of 21 January 2002 the author comments on the State party's submission. He agrees that the case which was decided by the European Court is highly comparable with the present communication. He argues, however, that decisions of the European Court interpreting the European Convention cannot be decisive when interpreting the Covenant, since they are two different treaties with different States parties and different supervisory mechanisms.

5.2 Furthermore, the author submits that the European Court leaves States parties in tax cases a wide margin of appreciation. The author argues that the application of this approach to article 26 of the Covenant would undermine the basic and general character of the principle of non-discrimination. The proper test under article 26 is whether the criteria for differentiation are reasonable and objective.

5.3 The author also argues that political considerations cannot, in themselves, be regarded as a reasonable and objective justification for a distinction between similar situations which does not have a reasonable, legitimate aim in itself. In the author's opinion, admitting such considerations as a justification under article 26 would largely deprive the non-discrimination clause of its content.

5.4 The author refers to his original communication and reiterates that the distinction made in the present case is discriminatory. He challenges the Supreme Court's conclusion, invoked by the State party, that holiday vouchers and holiday payments cannot be regarded as identical situations and refers in this respect to the Government's initial proposal in 1990 to tax the vouchers against a rate of 100 per cent. According to the author, the Supreme Court leaves too much of a margin of appreciation to the public authorities when deciding whether a different treatment of a very similar situation is justified. The author argues that to the extent that there may be a relevant difference between holiday vouchers and holiday payments, this difference is far too small to justify an exemption of 25 per cent for holiday vouchers, making the difference in treatment disproportionate and thus discriminatory.

Issues and proceedings before the Committee

6.1 Before considering any claims contained in a communication, the Human Rights Committee must, in accordance with rule 87 of its rules of procedure, decide whether or not the communication is admissible under the Optional Protocol to the Covenant.

6.2 The Committee notes that the author claims to be a victim of a violation of article 26 by the Netherlands because of the different treatment in taxation of holiday payments between him and those employees who receive their payments through vouchers. The Committee further notes that the courts in the Netherlands have decided that the difference in treatment is based on factual and legal differences in the two forms of payment. The author's claim is based on a different assessment of these differences.

6.3 The Committee takes note of the reasons advanced by the State party as to why it decided to raise the valuation of the holiday vouchers in a gradual manner. It considers that the author has not substantiated, for purposes of admissibility, his claim that he, as a recipient of holiday pay, similarly to the vast majority of employees in the State party, was discriminated against compared to the small minority of workers who, because of the nature of their work, receive holiday vouchers, the taxation of which continues to be somewhat lower than that of holiday pay. Therefore, this part of the communication is inadmissible pursuant to article 2 of the Optional Protocol.

6.4 Concerning the author's claim about indirect discrimination (paragraph 3.4 above), the Committee notes that the author is not a woman and thus cannot be considered to be a victim within the meaning of article 1 of the Optional Protocol. Accordingly, this part of the complaint is inadmissible pursuant to article 1 of the Optional Protocol.

7. The Committee therefore decides:

(a) That the communication is inadmissible under articles 1 and 2 of the Optional Protocol;

(b) That this decision shall be communicated to the State party and to the author.

[Adopted in English, French and Spanish, the English text being the original version. Subsequently to be issued also in Arabic, Chinese and Russian as part of the present report.]

I. Communication No. 990/2001, *Irschik v. Austria* (Decision adopted on 19 March 2004, eightieth session)*

Submitted by: Mr. Arthur Irschik (not represented by counsel)

Alleged victim: The author; his two sons, Lukas and Stefan Irschik

State party: Austria

Date of communication: 12 December 2000 (initial submission)

The Human Rights Committee, established under article 28 of the International Covenant on Civil and Political Rights,

Meeting on 19 March 2004,

Adopts the following:

Decision on admissibility

1. The authors of the communication are Arthur Irschik ("the author"), born on 4 January 1963, and his two sons, Lukas and Stefan Irschik, born on 11 February 1994 and, respectively, on 16 November 1996; they are Austrian nationals. The author claims that he and his sons are victims of a violation by Austria[1] of article 26 of the International Covenant on Civil and Political Rights (the Covenant). He submits the communication on his own behalf as well as on behalf of his sons; he is not represented by counsel.

The facts

2.1 The author, a tax consultant, claimed a reduction of his income tax in his tax assessment forms for the years 1996, 1997 and 1998, as his maintenance obligations towards his two children were not (fully) deductible from the taxable base of his income.

2.2 In doing so, he relied on the landmark decision of the Austrian Constitutional Court of 17 October 1997, in which the Court, after having examined ex officio the constitutionality of several provisions of the Income Tax Law (*Einkommenssteuergesetz*) and of the Law on Family Taxation (*Familienbesteuerungsgesetz*), declared these provisions unconstitutional insofar as they did not allow tax payers with maintenance obligations towards their children to deduct at least half of these expenditures from the taxable base of their income. The Court held that the direct child benefits and child maintenance deductibles available in Austria fell short of compensating for the extra burden placed on parents with obligations to pay maintenance for their children. The fact that such expenditures, which were already taken off their personal budget, formed part of the taxable base (with the exception of the above-mentioned deductibles) placed parents at a disadvantage as compared to persons not liable to pay maintenance.

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* The following members of the Committee participated in the examination of the present communication: Mr. Abdelfattah Amor, Mr. Nisuke Ando, Mr. Prafullachandra Natwarlal Bhagwati, Ms. Christine Chanet, Mr. Franco Depasquale, Mr. Maurice Glèlè Ahanhanzo, Mr. Walter Kälin, Mr. Rafael Rivas Posada, Sir Nigel Rodley, Mr. Martin Scheinin, Mr. Ivan Shearer, Mr. Hipólito Solari Yrigoyen, Ms. Ruth Wedgwood, Mr. Roman Wieruszewski and Mr. Maxwell Yalden.

2.3 Under article 140, paragraph 5,[2] of the Austrian Federal Constitution Act (*Bundes-Verfassungsgesetz*), the Court ruled that the declaration of unconsititutionality would take effect from 1 January 1999, so as to grant the legislator sufficient time to amend the law. In accordance with the so-called "test case legislation" (*Anlassfallregelung*), the old legislation continued to apply to all cases arising before that date, with the exception of the two "test cases" that had given rise to the proceedings before the Constitutional Court (article 140, paragraph 7,[3] of the Federal Constitution Act). In these two cases, which concerned fiscal years 1993 and 1994, respectively, the impugned tax assessments were annulled.

2.4 The author's appeals against the tax assessment invoices for 1996, 1997, and 1998, in which his deduction claims had been rejected, were dismissed by the Vienna Regional Finance Directorate (*Finanzlandesdirektion für Wien, Niederösterreich und Burgenland*). Similarly, his complaints against two of these decisions (concerning tax assessments for the years 1996 and 1997), alleging violations of his constitutionally guaranteed rights to equality before the law and to security of property, were dismissed by the Constitutional Court on 8 June 1999, for lack of reasonable prospect of success. With regard to the 1998 tax assessment, the author did not complain to the Constitutional Court.

2.5 On 11 March 2000, the author, acting on his own behalf and not in the name of his children, submitted an application to the European Court of Human Rights, claiming violations of his rights under articles 6, 8, 12, and 13 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, as well as article 1, paragraph 1, of Protocol No. 1, read in conjunction with article 14 of the Convention. By decision of 11 September 2000, the Court declared the application inadmissible under article 35, paragraph 4, of the Convention, finding that the material before it did "not disclose any appearance of a violation of the rights and freedoms set out in the Convention or its Protocols".

The complaint

3.1 The author claims to be a victim of a violation of article 26 of the Covenant, as the continued application of the repealed provisions of the Income Tax Law and the Law on Family Taxation to his tax assessments for 1996, 1997 and 1998 amounted to discrimination, given that this legislation was no longer applied to the test cases which had given rise to the legal proceedings before the Constitutional Court resulting in the rescission of the said provisions. He claims that his sons are also victims of a violation of article 26, since the denial of the rights to deduct his maintenance expenditures from the taxable base of his income effectively reduced his net income, thereby reducing his children's maintenance entitlements, which were calculated on the basis of a certain percentage of his net income.

3.2 The author considers the preferential treatment of the test cases to be arbitrary, in the absence of any reasonable and objective criteria which would justify the application of less favourable provisions to his and all other cases not benefiting from the test case legislation. This legislation was discriminatory for all parents obliged to pay maintenance for their children, whose complaints were not among the first ones pending at the Constitutional Court, although their financial burden was similar to that of the plaintiffs in the test cases. In lieu of remedy, the author claims a compensation of 255,413 ATS, based on calculations enclosed with the communication.

3.3 Furthermore, the author submits that the rescinded provisions of the Income Tax Law and the Law on Family Taxation were not adequately amended by the legislator, who, apart from insignificantly increasing maintenance deductibles, merely re-enacted the same legislation, with effect from 1 January 1999.

3.4 The author claims that he has exhausted all effective domestic remedies. Although he could have lodged an appeal with the Administrative Court, after the Constitutional Court dismissed his complaints for fiscal years 1996 and 1997, this remedy would have been ineffective for purposes of invoking the principle of equality, since the Administrative Court is not competent to review the constitutionality of administrative acts, but only their conformity with lower-ranking law. As regards the tax assessment for 1998, another complaint to the Constitutional Court would have been ineffective in the light of the dismissal, by that Court, of identical complaints concerning tax assessments for 1996 and 1997.

3.5 The author states that the same matter is not being and has not been examined under another procedure of international investigation or settlement, since the rejection of his application by the European Court of Human Rights, declaring it inadmissible for being manifestly ill-founded, was not based on an examination of the merits of his complaint.

State party's observations on the admissibility of the communication

4.1 By note verbale of 17 September 2001, the State party objected to the admissibility of the communication, invoking its reservation to article 5, paragraph 2 (a), of the Optional Protocol, the effect of which was to preclude the Committee's competence to examine the communication, since the same matter had already been examined by the European Court of Human Rights.

4.2 The State party argues that the applicability of its reservation is not impeded by the fact that the European Court of Human Rights declared the author's application inadmissible under article 35, paragraph 4, of the European Convention, because the wording of the Court's decision ("[…] do not disclose any appearance of a violation of the rights and freedoms set out in the Convention or its Protocols") clearly indicates that the Court examined "far-reaching aspects of the merits in the light of article 35, paragraph 3, of the Convention".

4.3 Although the reservation does not expressly refer to the European Court but to the European Commission of Human Rights, the State party submits that it also applies to cases where the same matter has been examined by the Court, since the Court has taken over the tasks hitherto discharged by the Commission, as a result of the reorganization of the Council of Europe organs.

4.4 Insofar as the author submits the communication on behalf of his children, the State party invokes non-exhaustion of domestic remedies, arguing that he failed to raise violations of his children's constitutional or Covenant rights in the domestic proceedings.

Author's comments on the State party's observations on admissibility

5.1 By letter of 13 November 2001, the author responded to the State party's submission, challenging the applicability of the State party's reservation in his case. He argues that the same matter was not examined by the European Court of Human Rights, since the Court dismissed his application on purely formal grounds, without addressing the substance of his claims. There was consequently no risk of subjecting the decision of the European Court to review by the Committee, or of diverging case law of these bodies.

5.2 The reasoning of the Court's decision, declaring the application inadmissible under article 35, paragraph 4, of the Convention, was limited to a standard formula, from which it could not be ascertained what considerations led the Court to conclude that the author's claims were manifestly ill-founded. This conclusion, moreover, constituted an "abusive exercise" of the Court's power under article 35, paragraph 4, as it was in conflict with the former Commission's jurisprudence that, following a national court's decision to rescind a law, which as such violates the European Convention, that law must be repealed without delay and may not even be applied to cases having arisen before the date of rescission. The author concludes that, in the light of this jurisprudence, his application should have been treated as "manifestly founded", rather than manifestly ill-founded.

5.3 According to the author, a rejection on purely procedural grounds cannot be considered an examination, within the meaning of article 5, paragraph 2 (a), of the Optional Protocol, read in conjunction with the Austrian reservation. Otherwise, each rejection on formal grounds by the European Court would necessarily entail a similar decision by the Committee, de facto resulting in its lack of jurisdiction to examine the case on the merits. In a similar case,[4] the Committee had therefore decided that the European Commission did not "examine" an application, when it had declared it inadmissible on procedural grounds.

5.4 The author argues that considering a rejection of an application on the ground of being manifestly ill-founded as an "examination of the same matter" would lead to arbitrary results, depending on which one of the inadmissibility grounds enumerated in article 35 of the Convention the Court chooses to base its finding, in cases where more than one may apply.

5.5 With regard to his children, the author claims that no domestic remedies were available to them for purposes of challenging the tax assessment invoices, which were addressed to him exclusively. In the absence of direct applicability of the Covenant in Austria, as well as the necessary implementing legislation, his children were precluded from invoking their Covenant rights before the Austrian courts and authorities. He also emphasizes that he was not acting on behalf of his sons when he submitted his application to the European Court of Human Rights. The Austrian reservation was therefore inapplicable, by logical implication, insofar as the communication relates to his children's rights under article 26 of the Covenant.

State party's observations on the admissibility and merits of the communication

6.1 By note verbale of 16 January 2002, the State party made additional comments on the admissibility, and this time on the merits, of the communication. It reiterates that the dismissal of the author's application by the European Court of Human Rights, under article 35, paragraph 4, of the Convention, required an examination, if only summarily, of the merits of the complaint. Insofar as the author's children are concerned, the State party argues that any infringement of his Covenant rights, through the impugned tax assessments, "would only trigger reflex actions which are legally irrelevant in the present case".

6.2 In the alternative, if the Committee declares the communication admissible, the State party subsidiarily challenges its merits, arguing: (1) that the assessment of taxable income falls outside the scope of the Covenant; (2) that the continued application of the old legislation to non-test cases was justified by the objective need to grant the legislator enough time for adjusting the rescinded provisions; (3) that the author himself had failed to appeal to the Constitutional Court in time, so as to benefit from the test case effect; and (4) that, even if the relevant legal provisions had been repealed with immediate effect, the author would not have been successful to the full extent of his claim, given that the taxable base of his income for 1996 and 1997 would still have had to be calculated according to the old legislation.

Author's comments on the State party's additional observations

7. By letter of 15 April 2003, the author, in response to the State party's additional observations, reiterated the arguments of his previous submission, and challenged the State party's contention that the assessment of taxable income falls outside the scope of article 26 of the Covenant. If the Committee had found the discriminatory calculation of a lump-sum payment under the Austrian Pensions Act to be in breach of article 26, then this article must a fortiori cover discrimination in the determination of the taxable base of an individual's income.

Issues and proceedings before the Committee

8.1 Before considering any claim contained in a communication, the Human Rights Committee must, in accordance with rule 87 of its rules of procedure, decide whether or not the communication is admissible under the Optional Protocol to the Covenant.

8.2 The Committee notes the author's argument that further complaints to the Administrative Court of Austria (regarding tax assessments for 1996 and 1997), as well as to the Austrian Constitutional Court (regarding tax assessment for 1998), would have been futile in his situation, as the Administrative Court was not competent to review the conformity of the contested acts with the constitutional principle of equality, and since the Constitutional Court had already adjudicated on basically the same issue in its decision of 8 June 1999, dismissing the author's claims for lack of reasonable prospect of success. The State party has not challenged this argument. The Committee therefore concludes that the requirements of article 5, paragraph 2 (b), of the Optional Protocol have been met, insofar as the author claims a violation of his rights under article 26 of the Covenant.

8.3 With respect to the State party's argument that the communication is inadmissible under article 5, paragraph 2 (a), of the Optional Protocol, read in conjunction with the Austrian reservation to that article, the Committee notes that the author's application submitted to the European Court of Human Rights related to the same facts and issues as the communication pending before the Committee; the only difference is that the author did not act on behalf of his sons before the European Court. While the scope of article 14 of the European Convention is different from article 26 of the Covenant, given that the application of the latter is not limited to the other rights guaranteed in the Covenant, property rights are protected by article 1 of Protocol No. 1 to the European Convention and no separate issue therefore arises under article 26 of the Covenant. Accordingly, the Committee considers that it is seized of the "same matter" as the European Court was, to the extent that the author submits the communication on his own behalf.

8.4 As to the question of whether the European Court has "examined" the matter, the Committee recalls its jurisprudence that where the Strasbourg organs have based a decision of inadmissibility not solely on procedural grounds,[5] but on reasons that involve even limited consideration of the merits of the case, the same matter has been "examined" within the meaning of the respective reservations to article 5, paragraph 2 (a), of the Optional Protocol.[6] It considers that, in the present case, the European Court proceeded beyond an examination of purely procedural admissibility criteria, finding that the author's application "[did] not disclose any appearance of a violation of the rights and freedoms set out in the Convention or its Protocols".[7] The Committee observes that the State party's reservation cannot be denied simply on the assumption that this reasoning reflects a standard formula, from which it may not be ascertained on which considerations the Court's conclusion that the application was manifestly ill-founded was based.

8.5 Regarding the author's contention that the European Court's decision was in conflict with the jurisprudence of the former Commission, the Committee notes that it has no remit to review decisions and judgements of the European Court.

8.6 Accordingly, the Committee concludes that the communication is inadmissible under article 5, paragraph 2 (a), of the Optional Protocol, insofar as it relates to the author's claim that his rights under article 26 of the Covenant have been violated, since the same matter has already been examined by the European Court.

8.7 Insofar as the author submits the communication in the name of his children, the Committee notes the State party's objection that the author has not raised a possible violation of their constitutional or Covenant rights before the Austrian courts, and has therefore failed to exhaust domestic remedies on their behalf. It equally notes the author's argument that no legal remedies were available to his sons to challenge his tax assessment invoices for 1996, 1997 and 1998, and that the Covenant was not directly applicable under Austrian law. However, the Committee considers that it need not examine the issue of whether domestic remedies have been exhausted, in accordance with article 5, paragraph 2 (b), of the Optional Protocol, with regard to the author's sons, because the author has failed to substantiate, for purposes of admissibility, that any detrimental effects that his tax assessment invoices may have had, directly or indirectly, on his children's maintenance entitlements, would amount to a violation of their rights under article 26 of the Covenant. The Committee therefore concludes that this part of the communication is inadmissible under article 2 of the Optional Protocol.

9. The Human Rights Committee therefore decides:

(a) That the communication is inadmissible under articles 2 and article 5, paragraph 2 (a), of the Optional Protocol, the latter as modified by the State party's reservation;

(b) That this decision shall be communicated to the State party and to the authors.

[Adopted in English, French and Spanish, the English text being the original version. Subsequently to be issued also in Arabic, Chinese and Russian as part of the present report.]

Notes

[1] The Covenant and the Optional Protocol to the Covenant entered into force for the State party respectively on 10 December 1978 and 10 March 1988. Upon ratification of the Optional Protocol, the State party entered the following reservation:

> "On the understanding that, further to the provisions of article 5 (2) of the Protocol, the Committee provided for in article 28 of the Covenant shall not consider any communication from an individual unless it has been ascertained that the same matter has not been examined by the European Commission on Human Rights established by the European Convention for the Protection of Human Rights and Fundamental Freedoms."

[2] Article 140, paragraph 5, reads, in pertinent parts: "The rescission enters into force on the day of publication [of the Constitutional Court's decision in the Federal Law Gazette] if the Court does not set a deadline for the rescission. This deadline may not exceed 18 months."

[3] Article 140, paragraph 7, reads, in pertinent parts: "If a law has been rescinded on grounds of unconstitutionality [...], all courts and administrative authorities are bound by the decision of the Constitutional Court. The law shall, however, continue to apply to all cases arising before the rescission, with the exception of the test case, unless the Court, in its rescinding judgement, decides otherwise. If the Court, in its rescinding judgement, has set a deadline pursuant to paragraph 5, the law shall apply to all cases arising before the expiry of this deadline, with the exception of the test case."

[4] Communication No. 716/1996, *Dietmar Pauger v. Austria*, Views adopted on 25 March 1999, UN Doc. CCPR/C/65/D/716/1996, 30 April 1999, at para. 6.4.

[5] See communication No. 716/1996, *Dietmar Pauger v. Austria*, at para. 10.2.

[6] See communication No. 121/1982, *A.M. v. Denmark*, decision on admissibility adopted on 23 July 1982, UN Doc. CCPR/C/16/D/121/1982, at para. 6; communication No. 744/1997, *Linderholm v. Croatia*, decision on admissibility adopted on 23 July 1999, UN Doc. CCPR/C/66/D/744/1997, at para. 4.2.

[7] See communication No. 744/1997, at paras. 3 and 4.2.

J. Communication No. 999/2001, *Dichtl et al. v. Austria* (Decision adopted on 7 July 2004, eighty-first session)*

Submitted by:	Mr. Friedrich Dichtl et al. (represented by counsel, Mr. Alexander H.E. Morawa)
Alleged victim:	The author
State party:	Austria
Date of communication:	14 July 2000 (initial submission)

The Human Rights Committee, established under article 28 of the International Covenant on Civil and Political Rights,

Meeting on 7 July 2004,

Adopts the following:

Decision on admissibility

1. The authors of the communication are Mr. Friedrich Dichtl and five other Austrian citizens residing in Austria.[1] They claim to be victims of a violation by Austria of article 26 of the Covenant. The authors are represented by counsel. The Optional Protocol entered into force for Austria on 10 March 1988.

The facts as submitted by the authors

2.1 The authors are retired employees of the Social Insurance Board in Salzburg (*Salzburger Gebietskrankenkasse*). Counsel states that they receive retirement benefits under the relevant schemes of the Regulations of Service for Employees of the Social Insurance Board (*Dienstordnung A für die Angestellten bei den Sozialversicherungsträgern*).

2.2 Until 31 December 1993 the retirement benefits were adjusted pursuant to section 87 (3) of the Regulations according to new salary increases of active employees. On 1 January 1994 an amendment came into effect, linking the future adjustment of pensions to the annual multiplier valid for payments by the public pension fund. Some of the retired employees then initiated a lawsuit against the amendment, which they lost before the Austrian courts. The case was brought to the Human Rights Committee as case No. 803/1998, *Althammer et al. v. Austria*, and declared inadmissible by the Committee on 21 March 2002.

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* The following members of the Committee participated in the examination of the present communication: Mr. Abdelfattah Amor, Mr. Prafullachandra Natwarlal Bhagwati, Mr. Franco Depasquale, Mr. Maurice Glèlè Ahanhanzo, Mr. Walter Kälin, Mr. Ahmed Tawfik Khalil, Mr. Rajsoomer Lallah, Mr. Rafael Rivas Posada, Sir Nigel Rodley, Mr. Martin Scheinin, Mr. Ivan Shearer, Mr. Hipólito Solari Yrigoyen, Ms. Ruth Wedgwood and Mr. Roman Wieruszewski.

2.3 In July 1998 the Austrian Supreme Court ruled in two cases concerning bank employees that a retroactive modification of the rules for calculating the adjustment factors of retirement benefits was unlawful. Subsequently, on 2 November 1998, the authors filed a lawsuit seeking a judgement that the 1994 amendment to the Regulations was unlawful and an order to the Salzburg Regional Social Insurance Board to pay retirement benefits accordingly. The District Court dismissed the authors' claim on 17 June 1999. The authors' appeal was dismissed by the Appeals Court (*Oberlandesgericht Linz*) on 19 January 2000. The Supreme Court (*Oberster Gerichtshof*) rejected a further request for revision on 20 September 2000. All domestic remedies are thus said to be exhausted.

The complaint

3. Counsel refers to his arguments in case No. 803/1998 and claims that the authors' right to equality before the law has been violated.

State party's observations on the admissibility of the communication

4.1 By submission of 25 January 2002, the State party comments on the admissibility and merits of the communication. It notes that the facts and arguments advanced by counsel are the same as in case No. 803/1998. One of the authors of the present communication is said to be also an author in case No. 803/1998. The State party argues that in her specific case, the communication is inadmissible for violation of the principle *ne bis in idem*.

4.2 As to the merits of the communication, the State party refers to its observations in case No. 803/1998.

The authors' comments

5.1 By letter of 3 March 2002, counsel comments on the State party's observations. In reaction to the State party's objection to the admissibility of the communication in respect of one of the authors, counsel notes that the present communication raises identical issues of facts and law as communication No. 803/1998 and that he would like the Committee to either join the two communications or to decide both of them on the same day. Counsel further explains that the particular author exhausted two sets of domestic procedures (one which cumulated in case No. 803/1998 and one which cumulated in the present case) which were both considered admissible by the domestic courts.

5.2 By letter of 25 March 2002, counsel informs the Committee that a committee of the First Section of the European Court of Human Rights has declared inadmissible the application of the original co-authors of the communication.

Issues and proceedings before the Committee

6.1 Before considering any claims contained in a communication, the Human Rights Committee must, in accordance with rule 87 of its rules of procedure, decide whether or not the communication is admissible under the Optional Protocol to the Covenant.

6.2 The Committee notes that the issues before it are identical to those in case No. 803/1998, which was declared inadmissible by the Committee on 21 March 2002.[2] In that decision, the Committee considered that the authors had failed to substantiate, for purposes of admissibility, that the change brought about in the computation of their pension rights was discriminatory or otherwise possibly fell within the ambit of article 26 of the Covenant. The Committee notes that the authors of the present communication rely entirely on the arguments forwarded in communication No. 803/1998. The present communication is thus likewise inadmissible under article 2 of the Optional Protocol.

7. The Committee therefore decides:

(a) That the communication is inadmissible under article 2 of the Optional Protocol;

(b) That this decision shall be communicated to the State party and to the author.

[Adopted in English, French and Spanish, the English text being the original version. Subsequently to be issued also in Arabic, Chinese and Russian as part of the present report.]

Notes

[1] Originally the communication was presented by 12 Austrian citizens. On 9 October 2001, six of them withdrew their case before the Committee in order to continue their petition to the European Court of Human Rights.

[2] See para. 6.1 of the decision of the Human Rights Committee concerning communication No. 803/1998, CCPR/C/74/D/803/1998, of 21 March 2002.

K. Communication No. 1003/2001, *P.L. v. Germany* (Decision adopted on 22 October 2003, seventy-ninth session)*

Submitted by: P.L. (not represented by counsel)

Alleged victim: The author

State party: Germany

Date of communication: 10 March 1999 (initial submission)

The Human Rights Committee, established under article 28 of the International Covenant on Civil and Political Rights,

Meeting on 22 October 2003,

Adopts the following:

Decision on admissibility

1.1 The author of the communication is P.L., an Irish national, who also purports to submit the communication on behalf of his three sons, R.J.L., D.M.L. and T.P.L., who have dual nationality (Irish and German) and were born on 23 May 1984 (R.J.L.), 24 November 1986 (D.M.L.) and on 27 June 1990 (T.P.L.). The author claims that he and his sons are victims of violations by Germany[1] of articles 14, paragraph 1, and 23, paragraph 4, and his sons of a violation of article 24, paragraph 1, of the International Covenant on Civil and Political Rights ("the Covenant"). The author is not represented by counsel.

1.2 On 7 February 2002, the Committee, acting through its Special Rapporteur on new communications, decided to separate its consideration of the admissibility and the merits of the communication.

The facts as submitted by the author

2.1 On 20 November 1994, the author's wife left the family home together with her and the author's three sons. The District Court of Ratingen (*Amtsgericht Ratingen*), by interim injunction of 25 November 1994, granted her the sole right to determine the domicile of the children and, by decision of 19 March 1996, preliminary sole custody of the children during the time of separation of the spouses. On or about 21 June 1996, the Higher Regional Court of

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* The following members of the Committee participated in the examination of the present communication: Mr. Abdelfattah Amor, Mr. Nisuke Ando, Mr. Prafullachandra Natwarlal Bhagwati, Ms. Christine Chanet, Mr. Franco Depasquale, Mr. Maurice Glèlè Ahanhanzo, Mr. Walter Kälin, Mr. Ahmed Tawfik Khalil, Mr. Rafael Rivas Posada, Sir Nigel Rodley, Mr. Martin Scheinin, Mr. Ivan Shearer, Mr. Hipólito Solari Yrigoyen, Mr. Roman Wieruszewski and Mr. Maxwell Yalden.

Düsseldorf (*Oberlandesgericht Düsseldorf*) rejected the author's appeal against the decision of 19 March 1996. His constitutional complaint against the decisions of the lower courts was dismissed by the Federal Constitutional Court (*Bundesverfassungsgericht*) on 2 April 1997. On 28 April 1997, the author submitted an application to the European Commission of Human Rights, which was declared inadmissible on 19 January 1998.

2.2 By judgement of 27 October 1998, the District Court of Ratingen pronounced the divorce of the spouses. Custody was granted to the mother, since the Court considered her better placed to ensure the welfare of the children. It based its findings on a hearing of the three sons, each of whom had expressed his preference to stay with the mother. The Court rejected the author's argument that the mother had manipulated the children prior to the hearing, finding that their bonds with the mother were stronger than those with the author, which was considered understandable, given that the children had stayed with the mother throughout the time of separation. The decision to grant sole custody to the mother would also enable the children to retain continuity in schooling and to remain in familiar surroundings. As to visiting rights, the Court granted the author visiting rights twice a month on weekends and for several weeks during the holiday period.

2.3 In his appeal dated 18 December 1998, the author requested the Düsseldorf Higher Regional Court to quash the judgement of the District Court and grant custody to him. He argued that the mother neglected the children, that she was frequently absent, rarely cooked for them, failed to ensure their health care and neglected their bodily hygiene. Allegedly, the children even showed signs of physical abuse. The author reiterated that the mother exercised pressure on the children and manipulated their statements before the courts. In the alternative, if custody was not to be granted to him, the author requested extended visiting rights.

2.4 By decision of 1 March 1999, the Higher Regional Court dismissed the author's appeal without scheduling another hearing of the children. It considered that he was not better placed to ensure the children's welfare than the mother. Unlike the mother, the author had previously failed to cooperate with the Child Welfare Office of Ratingen. Moreover, allocation of sole custody to the mother was required to ensure continuity for the children and was consistent with their express wish to stay with the mother. The District Court's ruling on visiting rights was upheld, in the interest of not further destabilizing the children.

2.5 On 4 April 1999, the author faxed a constitutional complaint to the Federal Constitutional Court, without however enclosing copies of the impugned decisions of the lower courts. At the top of the fax cover, it was stated: "Advance fax […] (without enclosures)". By letter of 7 April 1999, the Federal Constitutional Court informed the author that so as to comply with the one-month deadline for lodging a constitutional complaint, a complainant must not only submit but also substantiate the complaint within the one-month period after the final decision of the lower court. This required submission of all relevant documents, in particular court decisions, before the end of that period, even in cases where a complaint was submitted on a preliminary basis for purposes of complying with the deadline. The author was advised that his complaint did not meet these requirements, since the judgements of 1 March 1999 and of 27 October 1998 had not been enclosed with the fax of 4 April 1999. It was therefore impossible for the Court to examine whether these decisions violated the author's constitutionally guaranteed right to protection by the courts. Insofar as the author had submitted the constitutional complaint on behalf of his sons, the letter raised doubts as to whether he was authorized to represent them as a non-custodial parent. It concluded that it was too late for supplementing the complaint, since the one-month period following the service (5 March 1999) of the decision of the Düsseldorf Higher Regional Court had expired on 6 April 1999.[2]

2.6 On 9 April 1999, the author's complaint, dated 4 April 1999 but carrying the postmark of 6 April 1999, was delivered to the Federal Constitutional Court by post, this time including copies of the relevant court decisions. By letter of 14 April 1999, the author was again advised that the one-month period for lodging a constitutional complaint had expired on 6 April 1999 and that he had failed to substantiate his complaint prior to that date.

2.7 On 16 March 2000, the author applied to the District Court of Ratingen for transfer of the custody of the children to him. He asked the Court to issue an interim order to that effect, and argued that the mother continually failed to take proper care of the children, which was reflected in their poor school performance as well as their deplorable state of health. The author requested the Court to appoint a legal guardian (*Verfahrensbetreuer*) to represent the interests of his children during the legal proceedings and to schedule another hearing of the children, who allegedly had stated their preference to live with him.

2.8 On 14 June 2000, the author challenged the competent judge on grounds of alleged bias, alleging that she had described his arguments in favour of another hearing of the children as "pure fantasies", attributable to his living in "an unreal world". His motion to have her replaced by another judge was declared ill-founded by the Higher Regional Court of Düsseldorf on 12 July 2000, on the basis that, in family law matters, judges were entitled to express their opinion to the parties, as long as they remained open to new and better arguments and arrangements.

2.9 By decision of 28 September 2000, the District Court of Ratingen rejected the author's motion to transfer custody to him, considering that the ongoing tensions between the ex-spouses were the main cause for the problems the children faced in school. The author himself, by his refusal to cooperate with the youth authorities, as well as his constant criticism of the mother, had himself exacerbated these tensions. Since the children had reiterated their wish to stay with the mother during a second hearing conducted by the Court, it found no reason to review its previous decision to grant sole custody to the mother. The author's immediate appeal against that decision was dismissed by the Higher Regional Court of Düsseldorf on 7 December 2000. No constitutional complaint was lodged in relation to these or any subsequent proceedings.

2.10 On 24 May 2001, the author, seeking extrajudicial relief in his matter, submitted a petition to the Petitions Committee of the German Federal Parliament and, on 8 September 2001, to the Minister of Youth, Family, Women and Health of the State of Northrhine-Westphalia, each time without success.

The complaint

3.1 With regard to his claim under article 14, paragraph 1, the author submits that the courts frequently denied his requests for the children to be heard and ignored evidence presented by him concerning the mother's neglect, if not abuse, of the children. The excessive length of the proceedings had led to the further deterioration of their physical and psychological state.

Moreover, the application of the principle of free jurisdiction (*Freie Gerichtsbarkeit*) permitted the family courts not to apply the procedural rules which would bind all other jurisdictions, thus leaving the judges wide discretion in evaluating evidence and in defining the child's "best interest".

3.2 The author submits that the award of sole custody to his ex-wife disenfranchised him to such an extent that he was not even allowed to speak to the children's doctors or teachers. In the absence of a distinction between custody and legal guardianship under German family law, he was unable to participate in any important decision regarding his sons. Thus, his wife was able to have her sons naturalized in Germany without even informing him. The author considers that this situation is in breach of his right to equality of spouses under article 23, paragraph 4, of the Covenant.

3.3 The author alleges that the failure of the German courts and authorities to put an end to the mother's neglect of the children, ranging from failure to take care of their health and education to instances of abuse, constitutes a denial of their right to the necessary protection by the State, in violation of articles 23, paragraph 4, and 24, paragraph 1, of the Covenant.

3.4 The author claims that he and his sons have exhausted all domestic remedies, since the Higher Regional Court of Düsseldorf, as the highest responsible court, rejected both his appeals on 1 March 1999 and 7 December 2000, respectively. He argues that a constitutional complaint to the Federal Constitutional Court is not an effective remedy in family law matters, because this Court regularly dismisses complaints against custody decisions of lower courts, as it is not competent to adjudicate on family law issues as such.

3.5 The author observes that the same matter is not being and has not been examined under another procedure of international investigation or settlement, since his application to the European Commission on Human Rights, which had been declared inadmissible on 19 January 1998, dealt with the decision of the German courts to grant his ex-wife preliminary sole custody of the children for the duration of the separation, and therefore with proceedings which were entirely different from the final award of custody and the rejection of his request to transfer custody to him, which constituted the subject matter of his communication to the Human Rights Committee.

The State party's submission on the admissibility of the communication

4.1 By note verbale of 4 October 2001,[3] the State party submitted its observations on the admissibility of the communication. It challenges admissibility on the basis that the author has not exhausted all available domestic remedies.

4.2 The State party argues that the author failed to lodge a constitutional complaint with the Federal Constitutional Court against the decisions of the Düsseldorf Higher Regional Court of 1 March 1999 within the one-month period following the impugned decision, as required by section 93 (1)[4] of the Law on the Federal Constitutional Court (*Bundesverfassungsgerichtsgesetz*). It was not sufficient that the author posted his complaint on 6 April 1999 - the last day of the one-month period - since a complaint must reach the Court by the end of the legal period; the author's complaint reached the Court only on 9 April 1999 and was therefore not registered.

4.3 In order to meet the deadline the author was not dependent on the postal service, since he was in possession of a fax machine. Therefore, he could simply have faxed his complaint on 5 or 6 April 1999 to the Federal Constitutional Court.

4.4 Moreover, the registrar of the Court, in his letter of 14 April 1999, informed the author that if he wished a judge to decide on the question of admissibility of the complaint, he should so inform the Court. However, the author preferred not to take up this opportunity.

4.5 Lastly, the State party submits that, contrary to the author's view, a constitutional complaint would not have been a priori a futile remedy.

Comments by the author

5. By letter of 28 November 2001, the author responded to the State party's observations on admissibility and, by letter of 18 February 2002, furnished additional information. He argues that the State party seeks to absolve itself of its responsibilities by means of a pure technicality (his failure to enclose the relevant court decisions with the complaint faxed on 4 April 1999), despite his repeated efforts to exhaust all remedies available under German law. Apart from his constitutional complaint of 4 April 1999, which reached the Federal Constitutional Court the same day by fax, he had lodged two similar complaints, which were dismissed by the Constitutional Court on 2 April 1997 (see paragraph 2.1) and on 29 December 1997.

Issues and proceedings before the Committee

6.1 Before considering any claims contained in a communication, the Human Rights Committee must, in accordance with article 87 of its rules of procedure, decide whether or not it is admissible under the Optional Protocol to the Covenant.

6.2 The Committee has ascertained that, insofar as the impugned decisions[5] are concerned, the same matter is not being examined under another procedure of international investigation or settlement for purposes of article 5, paragraph 2 (a), of the Optional Protocol. It recalls, in this context, that the author's application to the European Commission of Human Rights dealt with issues other than those before the Committee, namely the judgements of 19 March 1996 and of 21 June 1996, awarding temporary custody to the mother for the duration of the separation (see paragraph 2.1).

6.3 The Committee has noted the parties' arguments relating to the question of exhaustion of domestic remedies. In particular, it notes the State party's observation that, in order for a complainant to comply with the one-month deadline following service of the final decision of the lower courts, a constitutional complaint must reach the Federal Constitutional Court before the end of that period, and that all relevant documents, in particular the impugned court decisions, must accompany the complaint in substantiation thereof in order to enable an examination by the Constitutional Court as to whether the complainant's constitutional rights have been violated. It has noted the author's argument that he made repeated efforts to exhaust domestic remedies, by lodging three constitutional complaints relating to the same subject matter, despite the alleged ineffectiveness of this remedy in family law matters.

6.4 The issue before the Committee is whether, for purposes of exhausting all available domestic remedies, in accordance with article 5, paragraph 2 (b), of the Optional Protocol, the author was required to lodge a constitutional complaint against the decisions of the Ratingen District Court of 27 October 1997 and of 28 October 2000, as well as the decisions of the Düsseldorf Higher Regional Court of 1 March 1999 and of 7 December 2000, and, if so, whether he pursued this remedy in accordance with the procedural requirements prescribed by law.

6.5 The Committee observes that, in addition to ordinary judicial and administrative appeals, authors must also avail themselves of all other judicial remedies, including constitutional complaints, in order to fulfil the requirement of exhaustion of all available domestic remedies, insofar as such remedies appear to be effective in the given case and are de facto available to the author.[6] The Committee notes that the author's constitutional complaints of 29 July 1996 and of 15 July 1997, which were dismissed by the Constitutional Court on 2 April 1997 and 29 December 1997, respectively, related to legal proceedings different from the final award of custody to his ex-wife, which was the subject matter of the complaint faxed to the Constitutional Court on 4 April 1999. The dismissal of these constitutional complaints was therefore without prejudice to the prospect of success of the latter complaint. Moreover, the Committee notes that the author has failed to substantiate his contention that a constitutional complaint is generally ineffective in family law matters. The Committee concludes that, to exhaust all available domestic remedies, the author should have availed himself of the opportunity of lodging a constitutional complaint against the decisions of the German courts granting final custody to his ex-wife and rejecting subsequent applications for transfer of custody. Such a complaint could not ipso facto be considered an ineffective remedy, in the specific circumstances of the case.

6.6 As to whether the author pursued this remedy in accordance with the procedural requirements prescribed by law, the Committee notes that he failed to furnish copies of the decisions of the Ratingen District Court of 27 October 1998 and of the Düsseldorf Higher Regional Court of 1 March 1999 (award of post-divorce custody to the mother), when he faxed his complaint to the Federal Constitutional Court on 4 April 1999. These documents reached the Court only on 9 April 1999, after the expiry of the legal one-month deadline on 6 April 1999. That the author was not, at that point, represented by counsel and that he was possibly unaware of this requirement cannot justify his failure to comply with the procedural prerequisites of section 93 (1) of the Law on the Federal Constitutional Court.[7]

6.7 Insofar as the author claims that the rejection of his application for transfer of custody, on 28 September 2000, by the Ratingen District Court and, on 7 December 2000, by the Düsseldorf Higher Regional Court violated his and his sons' rights under articles 14, paragraph 1, 23, paragraph 4, and 24, paragraph 1, of the Covenant, the Committee notes that the author did not lodge a constitutional complaint against these decisions.

6.8 In the light of the foregoing, the Committee concludes that the author failed to exhaust all available domestic remedies.

7. The Committee therefore decides:

(a) That the communication is inadmissible under article 5, paragraph 2 (b), of the Optional Protocol;

(b) That this decision shall be communicated to the author, and, for information, to the State party.

[Adopted in English, French and Spanish, the English text being the original version. Subsequently to be issued also in Arabic, Chinese and Russian as part of the present report.]

Notes

[1] The International Covenant on Civil and Political Rights and the Optional Protocol entered into force for the State party respectively on 23 March 1976 and 25 November 1993.

[2] Undisputedly, 5 April 1999 was a public holiday in Germany.

[3] After numerous additional submissions had been received from the author, the communication was transmitted to the State party on 7 August 2001, under rule 91 of the Committee's rules of procedure.

[4] Section 93 (1) of the Law on the Federal Constitutional Court provides, in pertinent part, that "[t]he constitutional complaint must be lodged and substantiated within one month".

[5] The communication only relates to the decisions of the Ratingen District Court of 27 October 1997 and of 28 October 2000, as well as the decisions of the Düsseldorf Higher Regional Court of 1 March 1999 and of 7 December 2000. See para. 3.6.

[6] See communication No. 433/1990, *A.P.A. v. Spain*, decision on admissibility of 25 March 1994, UN Doc. CCPR/C/50/D/433/1990, 28 March 1994, at para. 6.2.

[7] See ibid.

L. Communication No. 1008/2001, *Hoyos v. Spain* (Decision adopted on 30 March 2004, eightieth session)*

Submitted by:	Isabel Hoyos Martínez de Irujo (represented by Mr. José Luis Mazón Costa)
Alleged victim:	The author
State party:	Spain
Date of communication:	4 September 2001 (initial submission)

The Human Rights Committee, established under article 28 of the International Covenant on Civil and Political Rights,

Meeting on 30 March 2004,

Having concluded its consideration of communication No. 1008/2001, submitted by Isabel Hoyos Martínez de Irujo under the Optional Protocol to the International Covenant on Civil and Political Rights,

Having taken into account all written information made available to it by the author of the communication and the State party,

Adopts the following:

Decision on admissibility

1. The author of the communication, dated 4 September 2001, is Isabel Hoyos y Martínez de Irujo, a Spanish national, who claims to be a victim of violations by Spain of articles 3, 17 and 26 of the International Covenant on Civil and Political Rights. The author is represented by counsel. The Optional Protocol to the Covenant entered into force for Spain on 25 January 1985.

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* The following members of the Committee participated in the examination of the present communication: Mr. Abdelfattah Amor, Mr. Nisuke Ando, Mr. Prafullachandra Natwarlal Bhagwati, Mr. Alfredo Castillero Hoyos, Ms. Christine Chanet, Mr. Franco Depasquale, Mr. Maurice Glèlè Ahanhanzo, Mr. Walter Kälin, Mr. Ahmed Tawfik Khalil, Mr. Rafael Rivas Posada, Sir Nigel Rodley, Mr. Martin Scheinin, Mr. Ivan Shearer, Mr. Hipólito Solari Yrigoyen, Ms. Ruth Wedgwood, Mr. Roman Wieruszewski and Mr. Maxwell Yalden.

Three separate individual opinions signed by Mr. Rafael Rivas Posada, Mr. Hipólito Solari Yrigoyen and Ms. Ruth Wedgwood are appended to the present document.

The facts as submitted by the author

2.1 The author was the firstborn daughter of Mr. Alfonso de Hoyos y Sánchez, who died on 15 July 1995. Subsequently, she applied to the King for succession to the ranks and titles held by her father, including the *Dukedom of Almodóvar del Río*, with the rank of *Grandee of Spain*. She asserts that she made a formal application with the intention of placing on record her greater right to succession to the title in question.

2.2 In an Order published in the *Boletín Oficial del Estado* of 21 June 1996, succession to the title of *Duke of Almodóvar del Río* was granted to the author's brother, Isidoro Hoyos y Martínez de Irujo.

2.3 The author asserts that, although as firstborn daughter she had the greater right, she had agreed to renounce the title under an agreement she had made with her brothers on the distribution of their father's titles of nobility. She asserts that at the time this took place, the criterion established by the judgement of the Supreme Court of 20 June 1987, pronouncing the precedence for males in succession to titles of nobility discriminatory and unconstitutional, was in force. However, the Constitutional Court's judgement of 3 July 1997 abrogated that decision; it stated that male primacy in the order of succession to the titles provided for in the Acts of 4 May 1948 and 11 October 1820, was neither discriminatory nor unconstitutional, given that article 14 of the Spanish Constitution, which guaranteed equality before the law, was not applicable in view of the historical and symbolic nature of the institution.[1] The author argues that this led to her brothers initiating legal proceedings to strip her of her titles.

2.4 As a result, in June 1999, the author instituted legal proceedings against her brother Isidoro in Majadahonda Court of First Instance No. 6, asserting her greater right to the title.

2.5 In its judgement of 11 May 2000, the Majadahonda Court dismissed the claim, in accordance with the Constitutional Court's judgement of 3 July 1997. The judge said, however, that she sympathized with the author's position but she could not deviate from the interpretation the Constitutional Court had given to the laws and provisions of the legal regime.

2.6 The author asserts that article 38, paragraph 2, of the Constitutional Court Organization Act provides that "Judgements for dismissal of appeals on matters of constitutionality and in disputes in defence of local autonomy may not be the subject of any subsequent appeal on the issue by either of these two means, based on the same violation of the same constitutional precept." Consequently, on the basis of the Constitutional Court's judgement of 3 July 1997, she considers that no effective remedy remains open to her. She nevertheless filed an appeal with the Provincial High Court.

2.7 On 15 April 2002, the State party informed the Committee that judgement had been delivered on 23 January 2002 on the appeal filed by the author with the Provincial High Court, and that the author had subsequently filed an application for review with the Supreme Court, consideration of which was pending.

The complaint

3.1 The author maintains that the State party is in violation of article 26, which guarantees that all persons are equal before the law, and prohibits any discrimination, inter alia, on the ground of sex. She asserts that the law governing succession to titles of nobility discriminates against her merely because she is a woman, since the title was granted to her younger brother owing to male primacy. In her view, succession to titles is regulated by the law and the judge of first instance failed to apply article 26 of the Covenant, owing to her obligation under the irremediable bond linking courts and judges to the jurisprudence of the Constitutional Court, as established in Spanish law.

3.2 The author reminds the Committee that in its general comment No. 18 on the right of non-discrimination, it stated: "*While article 2 limits the scope of the rights to be protected against discrimination to those provided for in the Covenant, article 26 does not specify such limitations*", and that "*In the view of the Committee, article 26 does not merely duplicate the guarantee already provided for in article 2 but provides in itself an autonomous right. It prohibits discrimination in law or in fact in any field regulated and protected by public authorities.*" The author argues that article 26 therefore refers to the obligations imposed on States in respect of their laws and the application of those laws, and that, accordingly, in adopting a law, the State party must ensure that it is in compliance with the provisions of article 26 in that its content is not discriminatory. She contends that, as she is the firstborn daughter, the granting of the title to her younger brother constitutes an unacceptable breach of the principle of equality between men and women.

3.3 The author asserts that article 3 of the Covenant has also been violated, in conjunction with article 26, since States parties have the obligation to grant equality to men and women in the enjoyment of civil and political rights. She further claims that the foregoing may be linked to article 17 of the Covenant since, in her opinion, a title of nobility is an element of the private life of the family group of which it forms part. In this regard, she recalls that, in its general comment No. 28 concerning article 3 of the Covenant, the Committee stated: "*Inequality in the enjoyment of rights by women throughout the world is deeply embedded in tradition, history and culture ...*". She also notes that, in paragraph 4 of the same comment, the Committee established that "*Articles 2 and 3 mandate States parties to take all steps necessary, including the prohibition of discrimination on the ground of sex, to put an end to discriminatory actions, both in the public and the private sector, which impair the equal enjoyment of rights.*"

3.4 In a written submission of 28 August 2001, the author comments on the effects of the discrimination of which she claims to be the victim. In her opinion, while the title of nobility has no financial value, the fact that it was not awarded to her on the ground of her sex was wounding to her dignity as a woman and also involved the investment of time and efforts - including financial efforts - to defend her right not to be discriminated against. She claims that she has been prevented from appearing in her own right as *Duchess of Almodóvar del Rio* in the official list of holders of titles of nobility, published by the Ministry of Justice and entitled "*Guía de Grandezas y Titulos del Reino*" (Guide to the Nobility and Titles of the Kingdom).

State party's observations on admissibility and the merits

4.1 The State party, in its written submission dated 9 November 2002, argues that the communication should be declared inadmissible by virtue of article 2 and article 5, paragraph 2 (b) of the Optional Protocol, since domestic remedies have not been exhausted. It asserts that the author has an appeal pending with the Madrid Provincial High Court, consideration of which has not been unduly delayed.

4.2 The State party goes on to argue that an alleged violation of the Covenant cannot be asserted on the basis of a violation of the Covenant itself and the Optional Protocol, nor on the basis of a breach of domestic law. It points out that judicial proceedings and possible successive appeals are regulated under the Spanish legal regime. After the judgement of the Court of First Instance, it is possible to appeal to the Provincial High Court, whose decision can in turn be appealed to the Supreme Court; if it is considered that some fundamental right has been violated, an application for *amparo* can be lodged with the Constitutional Court. The State party argues that "*to lodge and uphold an appeal only in order to mark time until the Committee expresses its views on this case, and to simultaneously submit a communication to the Committee, whose future comments in this connection will provide valid substance for the appeal, is to seek undue interference by the Committee with a domestic court, which would come within the competence of the Special Rapporteur on the independence of judges and lawyers*".

4.3 The State party asserts that the same matter was submitted by other women to the European Court of Human Rights, which declared these applications inadmissible *ratione materiae*, not for the reason given by the author but because it arrived at the conclusion that the use of a title of nobility fell outside the purview of the right to privacy and family life.

4.4 The State party asserts that the communication fails to substantiate any violation of article 26, since the use of a title of nobility is merely *nomen honoris*, devoid of any legal or material content. It argues that if the use of a title had any material substance, i.e. if it was a human right, it would be inherited by all the children, without discrimination on the ground of primogeniture or sex, as in the case of the property of the deceased in the institution of inheritance, which is regulated by the Civil Code. It adds that it would be unconstitutional for titles to have material content, since that would be the expression of "the most odious discrimination, that of birth, which for many centuries prevented human beings from being born free and equal in dignity and in rights". The State party further argues that the author does not claim a possible inequality before the law or that there is a violation of articles 3 and 17 of the Covenant. It accordingly contests the admissibility of the communication *ratione materiae* in accordance with article 3 of the Optional Protocol.

4.5 In its written submission dated 7 March 2002, the State party reiterates its arguments on inadmissibility, and on the merits asserts that the author alleges "*discrimination against women in the order of succession to titles of nobility*", which constitutes an *actio popularis*. In this respect it argues that the system established in the Covenant and the Optional Protocol requires there to be a victim of a specific violation.

4.6 The State party draws attention to the fact that the author, who holds the titles of "*Marquise of Hoyos, Marquise of Almodóvar del Río, Marquise of Isasi and Grandee of Spain*", succeeded her father in the use of two of the titles and renounced the *Dukedom of Almodóvar del Río* in favour of her brother Isidoro. It adds that this "*extremely personal and voluntary*"[2] renunciation led her brother to apply to succeed in the use of the title.[3]

4.7 The State party recalls that when the title of nobility in question was granted to the first *Duke of Almodóvar del Río* in 1780, men and women were not yet considered to be born equal in dignity and rights. It argues that nobility is a historical institution, defined by inequality in rank and rights through the "divine design" of birth.

4.8 For the State party, a title of nobility is not property, but simply an honour of which use may be made but of which no one has ownership. Accordingly, succession to the title is by the law of bloodline, outside the law of inheritance, since the holder succeeding to the title does not succeed to the holder most recently deceased, but to the first holder, the person who attained the honour. The State party further argues that use of the title is not a human right, nor is it part of the inheritance of the deceased, nor does it adhere to the laws on inheritance in the Civil Code.

4.9 The State party contends that the use of a title of nobility cannot be considered part of the right to privacy, since membership of a family is attested to by the name and surnames, as regulated under article 53 of the Spanish Civil Register Act and international agreements. To consider otherwise would raise a number of questions, such as whether those who do not use titles had no family identification, or whether relatives in a noble family who did not succeed to the title would not be identified as members of the family. In the view of the State party, inclusion of the use of a title in the human right to privacy and family life would contravene the equality of human beings and the universality of human rights.

4.10 The State party points out that the rules of succession for the use of the title of nobility in question embody a first element of discrimination by reason of birth, since only a descendant can succeed to the title; a second element of discrimination lies in birth order, based on the former belief in the better blood of the firstborn; and lastly, sex constitutes a third element of discrimination. The State party contends that the author accepts the first two elements of discrimination, even basing some of her claims thereon, but not the third.

4.11 The State party contends that the Spanish Constitution allows the continued use of titles of nobility, but only because it views them as a symbol, devoid of legal or material content, and cites the Constitutional Court to the effect that if use of a title meant "*a legal difference in material content, then necessarily the social and legal values of the Constitution would need to be applied to the institution of the nobility*". It argues that, admitting the continued existence of a historical institution, discriminatory but lacking in material content, there is no cause to update it by applying constitutional principles.[4] Only 11 judgements of the Supreme Court - not adopted unanimously - have departed from the ancient doctrine of the historical rules of succession to titles, as a result of which the question of constitutionality arose, the matter being decided by the judgement of the Constitutional Court of 3 July 1997. The State party affirms that respect for the historical rules of institutions is recognized by the United Nations and by the seven European States which admit the institution of nobility with its historical rules, as it does not represent any inequality before the law, since the law does not recognize that there is any legal or material content in titles of nobility. Consequently, there can be no violation of article 26 of the Covenant.

Author's comments on the State party's observations

5.1 In her written submission of 21 January 2002, the author reiterates that, in the case submitted to the Committee, it was futile to make a further submission to the domestic courts, since article 38, paragraph 2, and article 40, paragraph 2, of the Constitutional Court

Organization Act pre-empt reopening of consideration of the constitutionality of the Spanish legal system as it relates to succession to titles of nobility. For that reason, despite the fact that the judge of first instance in Majadahonda had expressed her personal sympathy for the author's case, she said that she had no option but to dismiss her action, in view of the Spanish Constitutional Court's position in that regard. The author emphasizes that she continued with domestic remedies to avoid the case being declared *res judicata*, thereby preventing possible views by the Committee against the State party from being made effective. The author argues that if the Committee found in her favour, for example before the Supreme Court concluded its consideration of her application for judicial review, she could enter the decision as evidence with sufficient force to permit a return to the former jurisprudence of equality of men and women in succession to titles of nobility, thereby obtaining effective redress for the injury done to her fundamental right to non-discrimination, that is, recovery of the title. She further maintains that, in accordance with the Committee's often stated jurisprudence, the victim is not obliged to use remedies that are ineffective.

5.2 The author claims that the ground for inadmissibility cited by the State party relating to article 5, paragraph 2 (a), is erroneous, since she was not a party to the proceedings brought by four Spanish women regarding succession to titles of nobility before the European Court of Human Rights. She recalls the Committee's decision in *Antonio Sánchez López v. Spain*,[5] that the concept of "the same case" should be understood as including the same claim and the same person.

5.3 The author claims that she is indeed a victim, that she is bringing a specific violation before the Committee, and that it is not an *actio popularis* as the State party maintains since she herself was discriminated against on the ground of sex. She reasserts that there has been a violation of article 3 of the Covenant, in conjunction with articles 26 and 17, since a person's sex is an element of his or her private life and to accord unfavourable treatment solely on the ground of membership of the female sex, irrespective of the nature of the discrimination, constitutes invasion of the privacy of the individual. She further argues that the title of nobility is itself a distinguishing feature of the family, a legacy of her ancestors, and that she therefore cannot be denied the further protection of article 3 in conjunction with article 17 of the Covenant. She adds that the conclusion of the European Court cannot influence any interpretation the Committee may make.

5.4 The author affirms that Spanish law, which regulates the succession of titles of nobility, maintains the earlier sexist tradition and discriminates against women. The law is not only anachronistic, but also manifestly incompatible with articles 26 and 3 of the Covenant, in conjunction with article 17. She asserts that when a State ratifies the Covenant, it has the obligation, in keeping with article 2, to adopt the legal reforms necessary to ensure that the Covenant is implemented in its entirety and without exceptions.

5.5 In a further written submission dated 12 June 2002, the author reiterates her comments on the admissibility of her complaint and emphasizes that the remedies must be exhausted provided they are indeed effective remedies. She observes that the State party refrains from comment on that point because it considers that the appeal and application for judicial review would be effective. In the author's opinion, these remedies would only be effective if they took into account a possible favourable expression of Views by the Committee. She goes on to say that decisions on applications for review take an inordinate amount of time - up to seven years.

5.6 With reference to the titles which the State party says she holds, the author affirms that one of the three is her husband's title and that the others, held by her father, have been the subject of judicial claims by her brothers on the basis of male precedence. Furthermore, the notarized document to which the State party refers is now out of date and was not even used in the judicial proceedings by her opponent. She maintains that the State party intends to challenge the facts of the domestic debate with discarded documents which were not presented to the domestic court by the person who had the right or possibility of doing so.

5.7 As regards the State party's various arguments on the institution of the title of nobility, the author argues that the subject of the debate should be restricted to ascertaining whether male primacy, applied as the sole and exclusive argument in the author's case, is or is not consistent with the provisions of the Covenant. In her view, the State party is endeavouring to introduce new elements which were not included in the domestic judicial proceedings and asserts that the privileges, referred to by the State party, which formerly accompanied a title no longer exist.

5.8 With reference to the State party's argument that the title is devoid of legal or material content, the author argues that the title in question has legal existence, since it is a document issued by the State and is embodied in an official instrument. She asserts that the question of titles is governed by article 1 of the Act of 4 May 1948, article 5 of the Decree of 4 June 1948, elaborating on the foregoing Act, article 13 of the *Ley Desvinculadota of 1820*, and Acts Nos. 8 and 9 of Title XVII of the *Novísima Recopilación*, referring to the *Leyes de Partidas y de Toro* and to section II, title XV, of Act No. 2. She states that a title of nobility has material existence since it is embodied in a provision issued by the Executive. The title is furthermore a symbol for which taxes are even paid and which also gives rise to numerous court cases. She argues that, for the State party, the "immaterial" component of the title justifies discrimination against women in succession, but does not take into account its symbolic and emotional value; she stresses that male primacy is an affront to the dignity of women and in her own case has caused her offence and wounded her self-esteem.

5.9 In the author's opinion, the State party's arguments reveal the considerable change that has taken place in the concept of titles of nobility, which have been stripped of aspects incompatible with the values of a constitutional State, except for that of discrimination against women. She considers that the State party is attempting to impugn titles of nobility for what they were and what they represented in the past, and not what they are in Spanish society today.

5.10 As to the use of a title of nobility not being a human right, as contended by the State party, the author claims that article 26 establishes equality of persons before the law and that the State party violates the article in according, on the one hand, legal status to succession to titles while, on the other hand, discriminating against women, in which connection the lack of any financial value of the titles is without importance since for the holders they possess great emotional value. She asserts that the title of *Dukedom of Almodóvar del Río* forms part of the private life of the Hoyos family, from which she is descended, and that even if certain family assets may not be heirlooms since they are indivisible or have little financial value, they should enjoy protection from arbitrary interference. She accordingly states that she is entitled to the protection established under article 3, in conjunction with article 17, of the Covenant.

5.11 The author asserts that it is not true that titles of nobility involve discrimination by birth, since this view would hold that inheritance as a general concept was discriminatory, and that claiming discrimination on the ground of progeniture is also erroneous, since the assertion is contrary to the Roman law principle of *prior tempore prior iure*, and moreover the allegation refers to a situation other than that raised by the communication. The author adds that consideration of progeniture in awarding a singular hereditary asset such as a title of nobility is a criterion that does not create unjust inequality, given the indivisible and emotional nature of that asset.

5.12 As to the information transmitted by the State party regarding the regime governing titles of nobility in other European countries, the author contends that in those countries the titles do not have formal legal recognition, as they do in Spain, and that as a result any dispute that may arise in other States would be different from that in the present case. What is involved is not recognition of titles, but just one aspect of such recognition already existing in legislative provisions in Spain, namely, discrimination against women with regard to succession.

Issues and proceedings before the Committee

6.1 Before considering any claims contained in a communication, the Human Rights Committee must, in accordance with rule 87 of its rules of procedure, decide whether or not it is admissible under the Optional Protocol to the Covenant.

6.2 The State party maintains that the author's communication should be found inadmissible on the basis of article 5, paragraph 2 (a), of the Optional Protocol. In this regard, the Committee notes that while the complaint that was submitted to the European Court of Human Rights concerned alleged discrimination with regard to succession to titles of nobility, that complaint did not involve the same person. Accordingly, the Committee considers that the author's case has not been submitted to another international procedure of investigation or settlement.

6.3 The State party maintains that the communication should be found inadmissible, affirming that domestic remedies have not been exhausted. Without entering into consideration of the motives which prompted the author to take further legal action subsequent to the first-instance decision, the Committee notes that any resubmission of her case before domestic courts would be futile, since article 38, paragraph 2, and article 40, paragraph 2, of the Constitutional Court Organization Act, in conjunction with the Constitutional Court judgement of 3 July 1997, rule out reopening of consideration of the constitutionality of the Spanish legal regime governing succession to titles of nobility. The Committee recalls its often stated View that, for a remedy to be exhausted, the possibility of a successful outcome must exist.[6]

6.4 The State party further maintains that the author is attempting an *actio popularis*; the Committee, however, notes that the author claims a violation of article 26, in conjunction with articles 3 and 17 of the Covenant, arguing that she was denied primacy regarding succession to the title of *Duchess of Almodóvar del Río* because she is a woman, which, in her view, constitutes discrimination and a violation of her right to family life. She links her complaint to the Constitutional Court decision of 3 June 1997 establishing male precedence in succession to titles of nobility. The Committee thus finds that the communication from Ms. Hoyos y Martínez de Irujo relates to her own situation.

6.5 The Committee notes that while the State party has argued that hereditary titles of nobility are devoid of any legal and material effect, they are nevertheless recognized by the State party's laws and authorities, including its judicial authorities. Recalling its established jurisprudence,[7] the Committee reiterates that article 26 of the Covenant is a free-standing provision which prohibits all discrimination in any sphere regulated by a State party to the Covenant. However, the Committee considers that article 26 cannot be invoked in support of claiming a hereditary title of nobility, an institution that, due to its indivisible and exclusive nature, lies outside the underlying values behind the principles of equality before the law and non-discrimination protected by article 26. It therefore concludes that the author's communication is incompatible *ratione materiae* with the provisions of the Covenant, and thus inadmissible pursuant to article 3 of the Optional Protocol.

7. The Committee therefore decides:

(a) That the communication is inadmissible under article 3 of the Optional Protocol;

(b) That this decision shall be communicated to the State party, to the author and to her counsel.

[Adopted in English, French and Spanish, the Spanish text being the original version. Subsequently to be issued also in Arabic, Chinese and Russian as part of the present report.]

Notes

[1] Two individual votes by three judges dissented from the content of the judgement; they considered that the provision in question should have been declared unconstitutional.

[2] The notarized document stated that the author renounced her claim to the title "*as an expression of affection towards her brother Isidoro*".

[3] The State party attaches a copy of the notarized document of 17 May 1996, recording the renunciation of her claim to use of the title.

[4] The State party cites a case in which the Constitutional Court rejected an application for *amparo* by a person who sought to succeed to a title, but did not accept the condition of marrying a noble.

[5] Case No. 777/1997, para. 6.2, decision of 25 November 1999.

[6] *Gómez Vásquez v. Spain*, communication No. 701/1996, para. 6.2; *Joseph Semen v. Spain*, communication No. 986/2001, para. 8.2.

[7] See e.g. Views on communication No. 182/1984 (*Zwaan de Vries v. The Netherlands*), Views adopted 9 April 1987.

ANNEX

Individual opinion of Committee member Rafael Rivas Posada (dissenting)

1. At its meeting on 30 March 2004, the Human Rights Committee decided to rule communication No 1008/2001 inadmissible under article 3 of the Optional Protocol. While recalling its consistent jurisprudence that article 26 of the Covenant is an autonomous provision prohibiting any discrimination in any area regulated by the State party, it states, in paragraph 6.5 of the decision, that article 26 "cannot be invoked as the basis for the claim to a hereditary title of nobility, an institution which, given its indivisible and exclusive nature, is peripheral to the values underlying the principles of equality before the law and non-discrimination which article 26 protects". On the strength of that reasoning, the Committee concludes that the author's complaint is incompatible *ratione materiae* with the Covenant and, thus, inadmissible under article 3 of the Optional Protocol.

2. In her complaint, the author alleges a violation of article 26 by the State party, pointing out that the article states that all persons are equal before the law and prohibits all discrimination, including discrimination on grounds of sex. Her application relates to discriminatory treatment she has suffered because of her sex, and the Committee should accordingly have restricted itself to considering this key element of her complaint and not, where admissibility is concerned, gone into other matters relating to the institution of hereditary titles.

3. The author's claim to be recognized as the heir to a noble title was based on Spanish law, not a caprice. The law was declared unconstitutional by a ruling of the Supreme Court on 20 June 1987 insofar as it related to a preference for the male line in succession to noble titles, i.e. because it discriminated on grounds of sex. Later, however, on 3 July 1997, the Constitutional Court found that male primacy in the order of succession to noble titles as provided for in the Act of 11 October 1820 and the Act of 4 May 1948 was neither discriminatory nor unconstitutional. As such decisions by the Constitutional Court are binding in Spain, legal discrimination on grounds of sex in the matter of succession to noble titles was reinstated.

4. The Committee, in deciding to find the communication inadmissible on the basis of a supposed inconsistency between the author's claim and the "values underlying" (sic) the principles protected by article 26, has clearly ruled *ultra petita*, i.e. on a matter not raised by the author. The author confined herself to complaining of discrimination against her by the State party on the grounds of her sex; the discrimination in the case before us was clear, and the Committee should have come to a decision on admissibility on the strength of the points clearly made in the communication.

5. Besides ruling *ultra petita*, the Committee has failed to take account of a striking feature of the case. Article 26 says that "the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any grounds such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status". Yet the law in Spain not only does not prohibit discrimination on grounds of sex where succession to noble titles is concerned, it positively requires it. There is, in my opinion, no doubt that this provision is incompatible with article 26 of the Covenant.

6. For the above reasons I consider that the Committee ought to have found communication No. 1008/2001 admissible, since it raises issues under article 26, not declare it incompatible *ratione materiae* with the provisions of the Covenant.

(*Signed*): Rafael Rivas Posada
16 April 2004

[Adopted in English, French and Spanish, the Spanish text being the original version. Subsequently to be issued also in Arabic, Chinese and Russian as part of the present report.]

Individual opinion of Committee member Mr. Hipólito Solari Yrigoyen (dissenting)

I should like to express the following dissenting views with regard to the communication under consideration.

The communication is admissible

The Committee takes note of the State party's affirmation that, in its opinion, the rules of succession to titles of nobility embody three elements of discrimination: the first element stipulates that only a descendant can succeed to the title; the second element upholds the right of primogeniture; and the third deals with sex. At the same the time, the Committee also takes note of the author's claims that the State party is endeavouring to introduce new elements in the domestic judicial proceedings; that primogeniture does not constitute discrimination but is based on the indivisible nature of the title and that, moreover, it constitutes an allegation other than that raised in the present communication; and, lastly, that the subject of the debate should be restricted to ascertaining whether male primacy, applied as the sole and exclusive argument in the author's case, is or is not consistent with the provisions of the Covenant. The Committee observes that, in the present communication, the title is being disputed between collateral relations and that the claim deals exclusively to discrimination on the ground of sex.

The Committee notes that, for the purposes of admissibility, the author has duly substantiated her claim of discrimination by reason of her sex, which could raise issues under articles 3, 17 and 26 of the Covenant. Consequently, the Committee is of the view that the communication is admissible and proceeds to consider the merits of the communication in accordance with article 5, paragraph 1, of the Optional Protocol.

Consideration on the merits

The *ratio decidendi*, or the grounds for the decision as to the merits, is limited to determining whether or not the author was discriminated against by reason of her sex, in violation of article 26 of the Covenant. The Committee could not include in its decisions issues that had not been submitted to it because, if it did so, it would be exceeding its authority by taking decisions *ultra petitio*. Consequently, the Committee refrains from considering the form of government (parliamentary monarchy) adopted by the State party in article 3 of its Constitution, and the nature and scope of titles of nobility since these issues are extraneous to the subject of the communication under consideration; however, the Committee notes that such titles are governed by law and are subject to regulation and protection by the authorities at the highest level, since they are awarded by the King himself who, under the Spanish Constitution, is the head of State (art. 56) and the sole person authorized to grant such honours in accordance with the law (art. 62 (f)).

The Committee would be seriously renouncing its specific responsibilities if it proceeded in the abstract to exclude from the scope of the Covenant, in the manner of an *actio popularis*, sectors or institutions of society, whatever they may be, instead of examining the situation of each individual case that is submitted to it for consideration for a possible specific violation of the Covenant (article 41 of the Covenant and article 1 of the Optional Protocol). If it adopted such a procedure, it would be granting a kind of immunity from considering possible cases of discrimination prohibited by article 26 of the Covenant, since members of such excluded sectors or institutions would be unprotected.

In the specific case of the present communication the Committee should not make a blanket pronouncement against the State party's institution of hereditary titles of nobility and the law by which that institution is governed, in order to exclude them from the Covenant and, in particular, from the scope of article 26, invoking incompatibility *ratione materiae*, because this would mean that it was turning a blind eye to the issue of sex-based discrimination raised in the complaint. The Committee has also noted that equality before the law and equal protection of the law without discrimination are not implicit but are expressly recognized and protected by article 26 of the Covenant with the broad scope that the Committee has given it, both in its comments on the norm and in its jurisprudence. This scope, moreover, is based on the clarity of a text that does not admit restrictive interpretations.

In addition to recognizing the right to non-discrimination on the ground of sex, article 26 requires States parties to ensure that their laws prohibit all discrimination in this regard and guarantee all persons equal and effective protection against such discrimination. The Spanish law on titles of nobility not only does not recognize the right to non-discrimination on the ground of sex and does not provide any guarantee for enjoying that right but imposes de jure discrimination against women, in blatant violation of article 26 of the Covenant.

In its general comment No. 18 on non-discrimination, the Human Rights Committee stated:

- "While article 2 limits the scope of the rights to be protected against discrimination to those provided for in the Covenant, article 26 does not specify such limitations. That is to say, article 26 provides that all persons are equal before the law and are entitled to equal protection of the law without discrimination, and that the law shall guarantee to all persons equal and effective protection against discrimination on any of the enumerated grounds. In the view of the Committee, article 26 does not merely duplicate the guarantee already provided for in article 2 but provides in itself an autonomous right. It prohibits discrimination in law or in fact in any field regulated and protected by public authorities. Article 26 is therefore concerned with the obligations imposed on States parties in regard to their legislation and the application thereof. Thus, when legislation is adopted by a State party, it must comply with the requirement of article 26 that its content should not be discriminatory."

At the same time, in its general comment No. 28 on equality of rights between men and women, the Committee stated:

- "Inequality in the enjoyment of rights by women throughout the world is deeply embedded in tradition, history and culture, including religious attitudes. The subordinate role of women in some countries is illustrated by the high incidence of prenatal sex selection and abortion of female foetuses. States parties should ensure that traditional, historical, religious or cultural attitudes are not used to justify violations of women's right to equality before the law and to equal enjoyment of all Covenant rights."

With regard to the prohibition of discrimination against women contained in article 26, the same general comment does not exclude in its application any field or any area, as is made clear by the following statements contained in paragraph 31:

- "The right to equality before the law and freedom from discrimination, protected by article 26, requires States to act against discrimination by public and private agencies in all fields."

- "States parties should review their legislation and practices and take the lead in implementing all measures necessary to eliminate discrimination against women in all fields."

The Human Rights Committee's clear and unambiguous position in favour of equal rights between men and women, which requires States parties to amend their legislation and practices, should cause no surprise in a United Nations treaty body, since the Organization's Charter, signed in San Francisco on 26 June 1945, reaffirms in its preamble faith in the equal rights of men and women as one of its fundamental objectives. However, history has shown that, in spite of the efforts that the recognition of rights requires, the most arduous task is to put them into practice, and that ongoing measures must be taken to ensure their effective implementation.

In the case under consideration, the disputed title was awarded to the author's younger brother, Isidoro de Hoyos y Martínez de Irujo, by the "*Ilustrísima Señora Jefa de Armas de Títulos Nobiliarios* on behalf of His Majesty the King, upon payment of the relevant tax, without prejudice to third parties with better rights" (order 11489 of 30 April 1995). Considering that she had a greater right to the title, Isabel de Hoyos y Martínez de Irujo instituted legal proceedings against her brother Isidoro in Majadahonda Court of First Instance, which dismissed her claim on the basis of the binding jurisprudence of the Constitutional Court which, in a divided judgement issued on 3 July 1997, ruled by majority that, the better rights that the law grants to men over women of equal lineage and kinship in the normal order of transfer *mortis causa* of titles of nobility are not discriminatory or in violation of article 14 of the Spanish Constitution of 27 December 1978, which is still in force, "since it declares that historical rights are applicable". The aforementioned article of the Constitution provides that Spaniards are equal before the law.

The same judge that ruled against the author pointed out that the jurisprudence on equality between the sexes in the matter of titles of nobility that was established by the Supreme Court over the course of a decade (from 1986 to 1997) and which was later set aside by the Constitutional Court seemed "more in keeping with the social reality of the time in which we live and which this court shares". She also added she "sympathizes with the author's position" and she encourages the author and other women of noble birth who are discriminated against to "continue to institute proceedings in defence of their rights and to make use of every available instance with a view to modifying the position of the Constitutional Court or even obtaining an amendment of the legislation on this subject". The judge also exempted the author from court costs in recognition of "the existence of [her] legitimate right to bring an action and discuss the disputed issue on which perhaps not everything has yet been said", as stated in her ruling.

Although the right to titles of nobility is not a human right protected by the Covenant, as the State party rightly contends, the legislation of States parties must not deviate from article 26. It is true that, as the Committee has pointed out in its jurisprudence, a difference in treatment based on arguments, including sex, of relevance to the purposes of article 26 does not constitute prohibited discrimination provided that it is based on reasonable and objective criteria. However, the establishment of the superiority of men over women, which is tantamount to saying that women are inferior to men, in matters of succession to titles of nobility governed by Spanish law and implemented by its courts, would not only deviate from such criteria but would be going to the opposite extreme. While States are allowed to grant legal protection to their historical traditions and institutions, they must do so in conformity with the requirements of article 26 of the Covenant.

The Committee is of the view that, in ruling legally that a particular honour should be granted principally to men and only accessorily to women, the State party is taking a discriminatory position vis-à-vis women of noble families that cannot be justified by reference to historical traditions or historical rights or on any other grounds. The Committee therefore concludes that the ban on sexual discrimination established by virtue of article 26 of the Covenant has been violated in the author's case. This being so, it is unnecessary to consider whether there may have been a violation of article 17 in conjunction with article 3 of the Covenant.

The Human Rights Committee, acting in accordance with article 5, paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights, is of the view that the facts before it disclose a violation of article 26 of the Covenant with respect to Isabel Hoyos y Martínez de Irujo.

(*Signed*): Hipólito Solari Yrigoyen

[Adopted in English, French and Spanish, the Spanish text being the original version. Subsequently to be issued also in Arabic, Chinese and Russian as part of the present report.]

Individual opinion of Committee member Ms. Ruth Wedgwood

In its review of country reports, as well as in its views on individual communications, the Human Rights Committee has upheld the rights of women to equal protection of the law, even in circumstances where compliance will require significant changes in local practice. It is thus troubling to see the Committee dismiss so cavalierly the communication of Isabel Hoyos Martínez de Irujo.

The distribution of family titles in Spain is regulated by public law. Decisions on succession to titles of honour or nobility are published as official acts of State in the *Boletin Oficial del Estado*. The order of succession is not a matter of private preference of the current titleholder. Rather, female descendants are statutorily barred from any senior claim to a title, pursuant to the preference for males, regardless of the wishes of the ascendant titleholder. Such a statutory rule, see statute of 4 June 1948, would seem to be a public act of discrimination.

The Committee's stated reasons for dismissing the communication of Ms. Hoyos Martínez de Iraujo, in her claim to inheritance of the title of the Duchy of Almodovar de Rio, can give no comfort to the State party. In rejecting her petition, as inadmissible *ratione materiae*, the Committee writes that hereditary titles of nobility are "an institution that … lies outside the underlying values behind the principles of equality before the law and non-discrimination protected by article 26". This cryptic sentence could be read to suggest that the continuation of hereditary titles is itself incompatible with the Covenant. One hopes that the future jurisprudence of the Committee will give appropriate weight to the desire of many countries to preserve the memory of individuals and families who figured prominently in the building of the national State.

The use of titles can be adapted to take account of the legal equality of women. Even within the tradition of a title, a change of facts may warrant a change in discriminatory rules. For example, in an age of national armies, it is no longer expected that a titleholder must have the ability to fight on the battlefield. (Admittedly, Jeanne d'Arc might suggest a wider range of reference as well.)

In its accession to modern human rights treaties, Spain recognized the difficulties posed by automatic male preference. Spain ratified the International Covenant on Civil and Political Rights on 27 July 1977. Spain also approved the Convention on the Elimination of All Forms of Discrimination against Women on 16 December 1983. In the latter accession, Spain made a single reservation that has importance here. Spain noted that the Convention shall not affect the constitutional provisions concerning succession to the Spanish crown. This unique protection for royal succession was not accompanied by any other similar reservation concerning lesser titles.

Spain did not make any similar reservation to the International Covenant on Civil and Political Rights in 1977. Still, good practice would suggest that Spain should be given the benefit of the same reservation in the application of the Covenant, in light of the Committee's later interpretation of article 26 as an independent guarantee of equal protection of the law. But the bottom line is that, even with this reservation, Spain did not attempt to carve out any special protection to perpetuate gender discrimination in the distribution of other aristocratic titles.

It is not surprising that a State party should see the inheritance of the throne as posing a unique question, without intending to perpetuate any broader practice of placing women last in line. Indeed, we have been reminded by the incumbent King of Spain that even a singular and traditional institution such as royalty may be adapted to norms of equality. King Juan Carlos recently suggested that succession to the throne of Spain should be recast. Under Juan Carlos' proposal, after his eldest son completes his reign, the son's first child would succeed to the throne, regardless of whether the child is a male or a female. In an age when many women have served as heads of State, this suggestion should seem commendable and unremarkable.

In its judgement of 20 June 1987, upholding the equal claim of female heirs to non-royal titles, the Supreme Court of Spain referenced the Convention on the Elimination of All Forms of Discrimination against Women, as well as article 14 of the 1978 Spanish Constitution. In its future deliberations, Spain may also wish to reference general comment No. 18 of the Human Rights Committee, which states that article 2 of the Covenant "prohibits discrimination in law or in fact in any field regulated and protected by public authorities". And it is worth recalling that under the rules of the Committee, the disposition of any particular communication does not constitute a formal precedent in regard to any other communication or review of country reports.

The hereditary title in question here has been represented by the State party as "devoid of any material or legal content" and purely *nomen honoris* (see paragraphs 4.4 and 4.8 supra). Thus, it is important to note the limits of the Committee's instant decision. The Committee's Views should not be taken as sheltering any discriminatory rules of inheritance where real or chattel property is at stake. In addition, these views do not protect discrimination concerning traditional heritable offices that may, in some societies, still carry significant powers of political or judicial decision-making. We sit as a monitoring committee for an international covenant, and cannot settle broad rules in disregard of these local facts.

(*Signed*): Ruth Wedgwood

[Adopted in English, French and Spanish, the English text being the original version. Subsequently to be issued also in Arabic, Chinese and Russian as part of the present report.]

M. Communication No. 1019/2001, *Barcaiztegui v. Spain* (Decision adopted on 30 March 2004, eightieth session)*

Submitted by: Ms. Mercedes Carrión Barcaiztegui (represented by Mr. Carlos Texidor Nachón and Mr. José Luis Mazón Costa)

Alleged victim: The author

State party: Spain

Date of communication: 8 March 2001 (initial submission)

The Human Rights Committee, established under article 28 of the International Covenant on Civil and Political Rights,

Meeting on 30 March 2004,

Adopts the following:

Decision on admissibility

1. The author of the communication, dated 8 March 2001, is Mercedes Carrión Barcaiztegui, a Spanish national, who claims to be a victim of violations by Spain of articles 3, 17 and 26 of the International Covenant on Civil and Political Rights. She is represented by counsel. The Optional Protocol to the Covenant entered into force for Spain on 25 January 1985.

The facts as submitted by the author

2.1 Ms. María de la Concepción Barcaíztegui Uhagón[1] - the author's aunt - held the title of *Marquise of Tabalosos*. By a notarized deed of 20 June 1989, she provided that on her death, her brother Iñigo Barcaíztegui Uhagón should succeed her as holder of the title. She died on 4 April 1993 without issue.

2.2 In February 1994 the author initiated a legal action against her uncle, Iñigo Barcaiztegui Uhagón, and her cousin, Javier Barcaiztegui Rezola, claiming the noble title of Marquis of Talabasos.[2] The author claimed the greater right, since she occupied by representation the place of her mother, Mercedes Barcaiztegui - deceased on 7 September 1990 - who was the younger sister of Concepción Barcaiztegui y Uhagón and the older sister of Iñigo Barcaiztegui Uhagón. The author also claims that renunciation of the title in favour of her uncle supposes a modification of the line of succession to the noble title and a contravention of the inalienable nature of titles of nobility.

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* The following members of the Committee participated in the examination of the present communication: Mr. Abdelfattah Amor, Mr. Nisuke Ando, Mr. Prafullachandra Natwarlal Bhagwati, Mr. Alfredo Castillero Hoyos, Ms. Christine Chanet, Mr. Franco Depasquale, Mr. Maurice Glèlè Ahanhanzo, Mr. Walter Kälin, Mr. Ahmed Tawfik Khalil, Mr. Rafael Rivas Posada, Sir Nigel Rodley, Mr. Martin Scheinin, Mr. Ivan Shearer, Mr. Hipólito Solari Yrigoyen, Ms. Ruth Wedgwood, Mr. Roman Wieruszewski and Mr. Maxwell Yalden.

Three separate individual opinions signed by Mr. Rafael Rivas Posada, Mr. Hipólito Solari Yrigoyen and Ms. Ruth Wedgwood are appended to the present document.

2.3 In response, counsel for the defendants cited, among other arguments, the fact that regardless of the validity of the transfer, the principle of male succession remained the preferential criterion for succession to the Marquisate of Tabalosos, which was governed not by a general norm, but by a specific act, at the royal prerogative, which did not constitute part of the legal order.

2.4 In a judgement of 25 November 1998, the Madrid Court of First Instance dismissed the author's action, finding that the suit concerned a situation involving collateral relatives of the last holder of the title; the court abided by the judgement of the Constitutional Court of 3 July 1997,[3] which declared the historical preferential criteria for the transmission of titles of nobility to be constitutional. These criteria are: firstly, the degree of kinship; next, sex - precedence of male descendants over female; and, thirdly, age. With regard to transfer of the title, the Madrid court determined that it did not represent a modification of the order of succession to titles of nobility.

2.5 The author claims that she has exhausted all remedies, since by virtue of the judgement of the Constitutional Court of 3 July 1997 no remedy is available to her.[4] However, on 10 December 1998, she appealed before the National High Court. In her communication she states that despite the manifest futility of such an appeal, she submitted it with the aim of preventing her case from becoming *res judicata*, thereby ensuring the right to an effective remedy, as provided for in article 2, paragraph 3 (a), of the Covenant. According to the author, if the Committee decides to accept her claims, the National High Court could ultimately find in her favour in her appeal.

The complaint

3.1 The author claims that the facts submitted to the Committee for its consideration constitute a violation of article 26 of the Covenant, in that male descendants are given preference as heirs to the detriment of women, thereby placing women in a situation of unjustified inequality. She argues that preference for males in succession to titles of nobility is not a mere custom of a private group, but a precept established in legal norms, regulated by Spanish laws of 4 May 1948, 11 October 1820 and *Partidas* II.XV.II. The author reminds the Committee that Economic and Social Council resolution 884 (XXXIV) recommends that States ensure that men and women, in the same degree of relationship to a deceased person, are entitled to equal shares in the estate and have equal rank in the order of succession. She maintains that in this case the estate comprises a specific item, namely the title of nobility, which can be transmitted to one person only, selected on the basis of the status of firstborn. The author claims that even if article 2 of the Covenant limits its scope to protection against discrimination of the rights set forth in the Covenant itself, the Committee, in its general comment No. 18, has taken the view that article 26 does not merely duplicate the guarantee already provided for in article 2 but provides in itself an autonomous right, prohibiting discrimination in law or in fact in any field regulated by public authorities and imposing a duty of protection on them in that regard.

3.2 The author claims that the facts constitute a violation of article 3 of the Covenant, in conjunction with articles 17 and 26. She reminds the Committee that in its general comment No. 28 of March 2000, on article 3, it drew attention to the fact that inequality in the enjoyment of rights by women was deeply embedded in tradition, history and culture, including religious attitudes.

State party's observations on admissibility and the merits

4.1 The State party, in its written submission of 14 December 2001, argues that the communication is inadmissible by virtue of article 2, and article 5, paragraph 2 (b) of the Optional Protocol, since domestic remedies have not been exhausted. The State party asserts that the complaint embodies a contradiction, since the author claims on the one hand that she has exhausted all domestic remedies, since the judgement by the plenary Constitutional Court rules out any resubmission of the issue before domestic courts, yet, on the other hand, states that she filed an appeal with the aim of rendering effective possible views by the Committee.

4.2 The State party observes that proceedings and the successive appeals possible are regulated under the Spanish legal regime. In the present case, after the judgement by the Court of First Instance, it was possible to appeal before the Provincial High Court, whose decision could be set aside on appeal by the Supreme Court; if it was considered that some fundamental right had been violated, an appeal for protection could be made before the Constitutional Court. The State party argues that the author is seeking to incorporate the Committee as an intermediate judicial body between those existing under Spanish law, thus violating its subsidiary nature and the legality of domestic proceedings. The State party contends that it is contrary to law to submit a case before a domestic court and before the Committee simultaneously, and in this connection refers to the United Nations Basic Principles on the Independence of the Judiciary, arguing that to make simultaneous submissions of the complaint is to seek undue interference by the Committee with a domestic court.

4.3 The State party asserts that the communication fails to substantiate any violation of article 26, since the use of a title of nobility is merely a *nomen honoris*, devoid of legal or material content, and that, furthermore, the author does not argue a possible inequality before the law or that there is a violation of articles 3 and 17 of the Covenant, in view of which the State party contests the admissibility of the communication *ratione materiae* in accordance with article 3 of the Optional Protocol.

4.4 The State party refers to the decision by the European Court of Human Rights of 28 October 1999 that the use of noble titles does not fall within the scope of article 8 of the European Convention. It argues that while the name of the applicant does not appear in that decision, the case concerned the same subject, in view of which it requests the Committee to find the complaint inadmissible in accordance with article 5, paragraph 2 (a), of the Optional Protocol.

4.5 In its written submission of 15 April 2002 the State party reiterates its arguments on inadmissibility, and on the merits recalls that when the title of nobility in question was granted to the first Marquis of Talabasos, in 1775, it was not the case that men and women were considered to be born equal in dignity and rights. The State party argues that nobility is a historical institution, defined by inequality in rank and rights owing to the "divine design" of birth, and claims that a title of nobility is not property, but simply an honour of which use may be made but over which no one has ownership. Accordingly, succession to the title is by the law of bloodline, outside the law of inheritance, since the holder succeeding to the title of nobility does not succeed to the holder most recently deceased, but to the first holder, the person who attained the honour, with the result that the applicable rules of succession to use of the title are those existing in 1775.

4.6 The State party points out to the Committee that the author is disputing use of the noble title of Marquis of Talabasos, not with a younger brother, but with her uncle and her first cousin; that she is not the firstborn daughter of the person who held the title before, but the daughter of the sister of the deceased holder, who was indeed the "firstborn female descendant" according to the genealogical tree provided by the author herself; the State party also notes that her sex did not prevent the deceased holder from succeeding to the title before her younger brother.

4.7 The State party affirms that the rules of succession for use of the title of nobility in question are those established in Law 2 of title XV of part II of the so-called *Código de las partidas* (legal code) of 1265, to which all subsequent laws dealing with the institution of the nobility and the transfer of the use of noble titles refer. According to the State party these rules embody a first element of discrimination by reason of birth, since only a descendant can succeed to the title; a second element of discrimination lies in birth order, based on the former belief in the better blood of the firstborn; and, lastly, sex constitutes a third element of discrimination. The State party contends that the author accepts the first two elements of discrimination, even basing some of her claims thereon, but not the third.

4.8 The State party asserts that the Spanish Constitution allows the continued use of titles of nobility, but only because it views them as a symbol, devoid of legal or material content, and cites the Constitutional Court to the effect that if use of a title of nobility meant "a legal difference in material content, then necessarily the social and legal values of the Constitution would need to be applied to the institution of the nobility", and argues that, admitting the continued existence of a historical institution, discriminatory but lacking material content, there is no cause to update it by applying constitutional principles.[5] According to the State party, only 11 judgements of the Supreme Court - not adopted unanimously - have departed from the ancient doctrine of the historical rules of succession to titles of nobility, as a result of which the question of constitutionality arose, the matter being decided by the judgement of the Constitutional Court of 3 July 1997. The State party affirms that respect for the historical rules of institutions is recognized by the United Nations and by the seven European States which admit the institution of nobility with its historical rules, as it does not represent any inequality before the law, since the law does not recognize that there is any legal or material content to titles of nobility, in view of which there can be no violation of article 26 of the Covenant.

4.9 The State party contends that use of a title of nobility is not a human right, or one of the civil and political rights set forth in the Covenant, and that it cannot therefore be considered part of the right to privacy, since being part of a family is attested to by the name and surnames, as regulated under article 53 of the Spanish Civil Register Act and international agreements. To consider otherwise would lead to various questions, such as whether those who do not use titles of nobility had no family identification, or whether relatives in a noble family who did not succeed to the title would not be identified as members of the family. According to the State party, inclusion of the use of a title of nobility in the human right to privacy and to a family would undermine equality of human beings and the universality of human rights.

Author's comments on the State party's observations

5.1 In her written submission of 1 April 2002 the author reiterates that, in her case, it was futile to make a further submission to the domestic courts since article 38, paragraph 2, and article 40, paragraph 2, of the Constitutional Court Organization Act pre-empt reopening of consideration of the constitutionality of the Spanish legal system as it relates to succession to titles of nobility. She emphasizes that she continued with domestic remedies to avoid the case being declared *res judicata*, thereby preventing possible views by the Committee against the State party from being made effective. She argues that if the Committee found in her favour, for example, before the Supreme Court concluded its consideration of her appeal for annulment, she could enter the decision as evidence with sufficient effect that it would lead to a return to the former jurisprudence of equality of men and women in succession to titles of nobility, thereby obtaining effective redress for the harm suffered to her fundamental right to non-discrimination, that is, recovery of the title. The author further affirms that in accordance with the Committee's often stated jurisprudence the victim is not obliged to use remedies that are futile.

5.2 The author claims that the ground for inadmissibility cited by the State party relating to article 5, paragraph 2 (a), is erroneous, since she was not a party to the proceedings brought by four Spanish women regarding succession to titles of nobility before the European Court of Human Rights.[6] The author recalls the Committee's decision in *Antonio Sánchez López v. Spain* that the concept of "the same case" should be understood as including the same claim and the same person.

5.3 The author alleges a violation of article 3 of the Covenant, in conjunction with articles 26 and 17, since the sex of a person is an element in privacy and to accord unfavourable treatment solely by virtue of belonging to the female sex, irrespective of the nature of the discrimination, constitutes invasion of the privacy of the individual. She further argues that the title of nobility is itself an element of the life of the family to which she belongs.

5.4 In a further written submission of 12 June 2002 the author reiterates her comments on the admissibility of her complaint and argues in addition that consideration of her appeal has been unduly delayed, since five years have elapsed. As to the merits, the author asserts that the Spanish legal system regulates the use, possession and enjoyment of titles of nobility as a genuine individual right. While succession to the title occurs with respect to the founder, succession to concessions of nobility does not arise until the death of the last holder, and that as a result the laws current at that time are applicable. The author maintains that while titles of nobility are governed by special civil norms based on bloodline, that is, outside the Civil Code with regard to succession, that does not mean that succession to titles falls outside the law of inheritance by blood relatives.

5.5 The author affirms that, with regard to the rules of succession to titles of nobility referred to by the State party, in the view of many theorists and the Supreme Court's own jurisprudence, the rule applies only to succession to the crown of Spain.

5.6 As for use of a title of nobility not being a human right, as contended by the State party, the author claims that article 26 of the Covenant establishes equality of persons before the law and that the State party violates the article in according, on the one hand, legal recognition of succession to titles of nobility while, on the other hand, discriminating against women, in which connection the lack of any financial value of the titles is without importance since for the holders they possess great emotional value. The author asserts that the title of Marquis of Tabalosos is part of the private life of the Carrión Barcaíztegui family, from which she is descended, and that even if certain family assets may not be heirlooms owing to being indivisible or having little financial value, they should enjoy protection from arbitrary interference. Accordingly she maintains that she is entitled to the protection established under article 3, in conjunction with article 17, of the Covenant, inasmuch as those provisions prevent discrimination in enjoyment of the rights protected by the Covenant. The author notes that between 1986 and 1997 the Supreme Court held that passing over women in the matter of succession to titles of nobility infringed article 14 of the Constitution, guarantee of equality before the law, a precedent that was overturned by the Constitutional Court judgement of 1997.

5.7 The author asserts that the reference by the State party to discrimination by birth with respect to titles of nobility is erroneous, since this view would hold that inheritance as a general concept was discriminatory, and that allegation of discrimination in terms of descendants was also erroneous, since that allegation referred to a situation other than that raised by the communication. She adds that consideration of progeniture in awarding a singular hereditary asset, such as a title of nobility, is a criterion that does not discriminate against men or women, or create unjust inequality, given the indivisible and essentially emotional nature of the inherited asset.

5.8 As for the information transmitted by the State party regarding the regime governing titles of nobility in other European countries, the author contends that in those countries the titles have no formal legal recognition, as they do in Spain, and that as a result any disputes that may arise in other States are different from that in the present case. What is at stake is not recognition of titles of nobility, but only an aspect of such recognition already existing in legislative provisions in Spain, namely discrimination against women with regard to succession. The author claims that for the State party the "immaterial" aspect of the title justifies discrimination against women in terms of succession, without taking account of the symbolic value of the title and the great emotional value, and that the precedence of males is an affront to the dignity of women.

Issues and proceedings before the Committee

6.1 Before considering any claims contained in a communication, the Human Rights Committee must, in accordance with rule 87 of its rules of procedure, decide whether or not it is admissible under the Optional Protocol to the Covenant.

6.2 The State party claims that the author's communication should be inadmissible on the basis of article 5, paragraph 2 (a), of the Optional Protocol. In this regard the Committee notes that while the complaint that was submitted to the European Court of Human Rights concerned alleged discrimination with regard to succession to titles of nobility, that complaint did not involve the same person. Accordingly, the Committee considers that the author's case has not been submitted to another international procedure of investigation or settlement.

6.3 The State party maintains that the communication should be found inadmissible, affirming that domestic remedies have not been exhausted. Nevertheless the Committee notes the author's argument with respect to her case that any resubmission before domestic courts would be futile, since article 38, paragraph 2, and article 40, paragraph 2, of the Constitutional Court Organization Act rule out reopening of consideration of the constitutionality of the Spanish legal system governing succession to titles of nobility. Accordingly, the Committee recalls its often stated view that for a remedy to be exhausted, the possibility of a successful outcome must exist.

6.4 The Committee notes that while the State party has argued that hereditary titles of nobility are devoid of any legal and material effect, they are nevertheless recognized by the State party's laws and authorities, including its judicial authorities. Recalling its established jurisprudence,[7] the Committee reiterates that article 26 of the Covenant is a free-standing provision which prohibits all discrimination in any sphere regulated by a State party to the Covenant. However, the Committee considers that article 26 cannot be invoked in support of claiming a hereditary title of nobility, an institution that, due to its indivisible and exclusive nature, lies outside the underlying values behind the principles of equality before the law and non-discrimination protected by article 26. It therefore concludes that the author's communication is incompatible *ratione materiae* with the provisions of the Covenant, and thus inadmissible pursuant to article 3 of the Optional Protocol.

The Committee therefore decides:

(a) That the communication is inadmissible under article 3 of the Optional Protocol;

(b) That this decision shall be communicated to the State party, to the author and to her counsel.

[Adopted in English, French and Spanish, the Spanish text being the original version. Subsequently to be issued also in Arabic, Chinese and Russian as part of the present report.]

Notes

[1] Concepción Barcáiztegui Uhagón was the firstborn daughter of José Barcaíztegui y Manso, the third Marquis of Tabalosos. María Mercedes Barcáiztegui Uhagón, the author's mother, was his second daughter and Iñigo Barcaíztegui Uhagón's elder sister. According to the author, Iñigo conceded the title to his son, Javier Barcaiztegui Uhagón.

[2] The author relates that she asked her cousin why her uncle had conceded the title to him.

[3] This judgement prompted the Supreme Court to modify its jurisprudence, which had departed from historical precedent with regard to equality of men and women.

[4] Article 38, paragraph 2, of the Constitutional Court Organization Act provides that "judgements for dismissal of appeals on matters of constitutionality and in disputes in defence of local autonomy may not be the subject of any subsequent appeal on the issue by either of these two means based on the same violation of the same constitutional precept".

[5] The State party cites a case in which the Constitutional Court rejected an appeal for protection by a person who sought to succeed to a title of nobility, but did not accept the condition of marrying a noble.

[6] Case No. 777/1967, decision dated 25 November 1999, para. 6.2.

[7] See e.g. Views on communication No. 182/1984 (*Zwaan-de Vries v. The Netherlands*), Views adopted on 9 April 1987.

APPENDIX

Individual opinion of Committee member Mr. Rafael Rivas Posada (dissenting)

1. At its meeting on 30 March 2004, the Human Rights Committee decided to rule communication No 1019/2001 inadmissible under article 3 of the Optional Protocol. While recalling its consistent jurisprudence that article 26 of the Covenant is an autonomous provision prohibiting any discrimination in any area regulated by the State party, it states, in paragraph 6.4 of the decision, that article 26 "cannot be invoked in support of claiming a hereditary title of nobility, an institution that, due to its indivisible and exclusive nature, lies outside the underlying values behind the principles of equality before the law and non-discrimination protected by article 26". On the strength of that reasoning, the Committee concludes that the author's complaint is incompatible *ratione materiae* with the Covenant and, thus, inadmissible under article 3 of the Optional Protocol.

2. In her complaint, the author alleges a violation of article 26 by the State party, pointing out that male descendants are given preference as heirs to the detriment of women, thereby placing women in a situation of unjustified inequality. Her application thus relates to discriminatory treatment she has suffered because of her sex, and the Committee should accordingly have restricted itself to considering this key element of her complaint and not, where admissibility is concerned, gone into other matters relating to the institution of hereditary titles.

3. The author's claim to be recognized as the heir to a noble title was based on Spanish law, not a caprice. The law was declared unconstitutional by a ruling of the Supreme Court on 20 June 1987 insofar as it related to a preference for the male line in succession to noble titles, i.e. because it discriminated on grounds of sex. Later, however, on 3 July 1997, the Constitutional Court found that male primacy in the order of succession to noble titles as provided for in the Act of 11 October 1820 and the Act of 4 May 1948 was neither discriminatory nor unconstitutional. As such decisions by the Constitutional Court are binding in Spain, legal discrimination on grounds of sex in the matter of succession to noble titles was reinstated.

4. The Committee, in deciding to find the communication inadmissible on the basis of a supposed inconsistency between the author's claim and the "underlying values behind" (sic) the principles protected by article 26, has clearly ruled *ultra petita*, i.e. on a matter not raised by the author. The author confined herself to complaining of discrimination against her by the State party on the grounds of her sex; the discrimination in the case before us was clear, and the Committee should have come to a decision on admissibility on the strength of the points clearly made in the communication.

5. Besides ruling *ultra petita*, the Committee has failed to take account of a striking feature of the case. Article 26 says that "the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any grounds such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth

or other status". Yet the law in Spain not only does not prohibit discrimination on grounds of sex where succession to noble titles is concerned, it positively requires it. There is, in my opinion, no doubt that this provision is incompatible with article 26 of the Covenant.

6. For the above reasons I consider that the Committee ought to have found communication No. 1019/2001 admissible, since it raises issues under article 26, not declare it incompatible *ratione materiae* with the provisions of the Covenant.

(*Signed*): Mr. Rafael Rivas Posada

[Adopted in English, French and Spanish, the Spanish text being the original version. Subsequently to be issued also in Arabic, Chinese and Russian as part of the present report.]

Individual opinion of Committee member Mr. Hipólito Solari Yrigoyen (dissenting)

I should like to express the following dissenting views with regard to the communication under consideration.

The communication is admissible

The Committee takes note of the State party's affirmation that, in its opinion, the rules of succession to titles of nobility embody three elements of discrimination: the first element stipulates that only a descendant can succeed to the title; the second element upholds the right of primogeniture; and the third deals with sex. At the same time, the Committee also takes note of the author's claims that the State party refers to situations different from those mentioned in the communication; that primogeniture is based on the indivisible nature of the title and does not constitute discrimination because it does not favour men over women; and, lastly, that the issue at hand is not recognition of titles of nobility but only an aspect of such recognition, namely discrimination against women, since Spanish legislation and a judgement of the Constitutional Court uphold the precedence of males, which is an affront to the dignity of women. The Committee observes that, in the present communication, the title is being disputed between collateral relations: the author as the representative of her deceased mother, and her mother's younger brother, and that the claim deals exclusively with discrimination on the ground of sex.

The Committee notes that, for the purposes of admissibility, the author has duly substantiated her claim of discrimination by reason of her sex, which could raise issues under articles 3, 17 and 26 of the Covenant. Consequently, the Committee is of the view that the communication is admissible and proceeds to consider the merits of the communication in accordance with article 5, paragraph 1, of the Optional Protocol.

Consideration on the merits

The *ratio decidendi*, or the grounds for the decision as to the merits, is limited to determining whether or not the author was discriminated against by reason of her sex, in violation of article 26 of the Covenant. The Committee could not include in its decisions issues that had not been submitted to it because, if it did so, it would be exceeding its authority by taking decisions *ultra petitio*. Consequently, the Committee refrains from considering the form of government (parliamentary monarchy) adopted by the State party in article 3 of its Constitution, and the nature and scope of titles of nobility since these issues are extraneous to the subject of the communication under consideration; however, the Committee notes that such titles are governed by law and are subject to regulation and protection by the authorities at the highest level, since they are awarded by the King himself who, under the Spanish Constitution, is the head of State (art. 56) and the sole person authorized to grant such honours in accordance with the law (art. 62 (f)).

The Committee would be seriously renouncing its specific responsibilities if, in its observations concerning a communication, it proceeded in the abstract to exclude from the scope of the Covenant, in the manner of an *actio popularis*, sectors or institutions of society, whatever they may be, instead of examining the situation of each individual case that is submitted to it for consideration for a possible specific violation of the Covenant (article 41 of the Covenant and article 1 of the Optional Protocol). If it adopted such a procedure, it would be granting a kind of immunity from considering possible cases of discrimination prohibited by article 26 of the Covenant, since members of such excluded sectors or institutions would be unprotected.

In the specific case of the present communication, the Committee could not make a blanket pronouncement against the State party's institution of hereditary titles of nobility and the law by which that institution is governed, in order to exclude them from the Covenant and, in particular, from the scope of article 26, invoking incompatibility *ratione materiae*, because this would mean that it was turning a blind eye to the issue of sex-based discrimination raised in the complaint. The Committee has also noted that equality before the law and equal protection of the law without discrimination are not implicit but are expressly recognized and protected by article 26 of the Covenant with the broad scope that the Committee has given it, both in its comments on the norm and in its jurisprudence. This scope, moreover, is based on the clarity of a text that does not admit restrictive interpretations.

In addition to recognizing the right to non-discrimination on the ground of sex, article 26 requires States parties to ensure that their laws prohibit all discrimination in this regard and guarantee all persons equal and effective protection against such discrimination. The Spanish law on titles of nobility not only does not recognize the right to non-discrimination on the ground of sex and does not provide any guarantee for enjoying that right but imposes de jure discrimination against women, in blatant violation of article 26 of the Covenant.

In its general comment No. 18 on non-discrimination, the Human Rights Committee stated:

- "While article 2 limits the scope of the rights to be protected against discrimination to those provided for in the Covenant, article 26 does not specify such limitations. That is to say, article 26 provides that all persons are equal before the law and are entitled to equal protection of the law without discrimination, and that the law shall guarantee to all persons equal and effective protection against discrimination on any of the enumerated grounds. In the view of the Committee, article 26 does not merely duplicate the guarantee already provided for in article 2 but provides in itself an autonomous right. It prohibits discrimination in law or in fact in any field regulated and protected by public authorities. Article 26 is therefore concerned with the obligations imposed on States parties in regard to their legislation and the application thereof. Thus, when legislation is adopted by a State party, it must comply with the requirement of article 26 that its content should not be discriminatory."

At the same time, in its general comment No. 28 on equality of rights between men and women, the Committee stated:

- "Inequality in the enjoyment of rights by women throughout the world is deeply embedded in tradition, history and culture, including religious attitudes. The subordinate role of women in some countries is illustrated by the high incidence of prenatal sex selection and abortion of female foetuses. States parties should ensure that traditional, historical, religious or cultural attitudes are not used to justify violations of women's right to equality before the law and to equal enjoyment of all Covenant rights."

With regard to the prohibition of discrimination against women contained in article 26, the same general comment does not exclude in its application any field or area, as is made clear by the following statements contained in paragraph 31:

- "The right to equality before the law and freedom from discrimination, protected by article 26, requires States to act against discrimination by public and private agencies in all fields."

- "States parties should review their legislation and practices and take the lead in implementing all measures necessary to eliminate discrimination against women in all fields."

The Human Rights Committee's clear and unambiguous position in favour of equal rights between men and women, which requires States parties to amend their legislation and practices, should cause no surprise in a United Nations treaty body, since the Organization's Charter, signed in San Francisco on 26 June 1945, reaffirms in its preamble faith in the equal rights of men and women as one of its fundamental objectives. However, history has shown that, in spite of the efforts that the recognition of rights requires, the most arduous task is to put them into practice, and that ongoing measures must be taken to ensure their effective implementation.

In the communication under consideration, María de la Concepción Barcaiztegui Uhagón, the previous holder of the disputed title of marquis, transferred her hereditary title of nobility to her brother Íñigo and, without entering into a consideration of the validity of the transfer, the Committee notes that, when María de la Concepción Barcaiztegui Uhagón died on 4 April 1993 without issue, the author, as the representative of her deceased mother, met the criterion of primogeniture. Believing that she had the better right, she initiated a legal action against her uncle, claiming the noble title of Marquis of Talabasos. Madrid Court of First Instance No. 18 dismissed the author's claim on the basis of the binding jurisprudence of the Constitutional Court which, in a divided judgement issued on 3 July 1997, ruled by majority that the better rights that the law grants to men over women of equal lineage and kinship in the normal order of transfer *mortis causa* of titles of nobility are not discriminatory or in violation of article 14 of the Spanish Constitution of 27 December 1978, which is still in force, "since it declares that historical rights are applicable". The aforementioned article of the Constitution provides that Spaniards are equal before the law.

Although the right to titles of nobility is not a human right protected by the Covenant, as the State party rightly contends, the legislation of States parties must not deviate from article 26. It is true that, as the Committee has pointed out in its jurisprudence, a difference in treatment based on arguments, including sex, of relevance to the purposes of article 26 does not constitute prohibited discrimination provided that it is based on reasonable and objective criteria. However, the establishment of the superiority of men over women, which is tantamount to saying that women are inferior to men, in matters of succession to titles of nobility governed by Spanish law and implemented by its courts, would not only deviate from such criteria but would be going to the opposite extreme. While States are allowed to grant legal protection to their historical traditions and institutions, they must do so in conformity with the requirements of article 26 of the Covenant.

The Committee is of the view that, in ruling legally that a particular honour should be granted principally to men and only accessorily to women, the State party is taking a discriminatory position vis-à-vis women of noble families that cannot be justified by reference to historical traditions or historical rights or on any other grounds. The Committee therefore concludes that the ban on sexual discrimination established by virtue of article 26 of the Covenant has been violated in the author's case. This being so, it is unnecessary to consider whether there may have been a violation of article 17 in conjunction with article 3 of the Covenant.

The Human Rights Committee, acting in accordance with article 5, paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights, is of the view that the facts before it disclose a violation of article 26 of the Covenant with respect to Mercedes Carrión Barcaiztegui.

***(Signed)*: Mr. Hipólito Solari Yrigoyen**

[Adopted in English, French and Spanish, the Spanish text being the original version. Subsequently to be issued also in Arabic, Chinese and Russian as part of the present report.]

Individual opinion of Committee member Ms. Ruth Wedgwood

In its review of country reports, as well as in its views on individual communications, the Human Rights Committee has upheld the rights of women to equal protection of the law, even in circumstances where compliance will require significant changes in local practice. It is thus troubling to see the Committee dismiss so cavalierly the communication of Mercedes Carrión Barcaiztegui.

The distribution of family titles in Spain is regulated by public law. Decisions on succession to titles of honour or nobility are published as official acts of State in the *Boletin Oficial del Estado*. The order of succession is not a matter of private preference of the current titleholder rather, female descendants are statutorily barred from any senior claim to a title, pursuant to the preference for males regardless of the wishes of the ascendant titleholder. Such a statutory rule, see statute of 4 June 1948, would seem to be a public act of discrimination.

The Committee's stated reasons for dismissing the communication of Ms. Carrión Barcaiztegui, in her claim to inheritance of the title of the Marquise of Tabalosos, can give no comfort to the State party. In rejecting her petition, as inadmissible *ratione materiae*, the Committee writes that hereditary titles of nobility are "an institution that … lies outside the underlying values behind the principles of equality before the law and non-discrimination protected by article 26". This cryptic sentence could be read to suggest that the continuation of hereditary titles is itself incompatible with the Covenant. One hopes that the future jurisprudence of the Committee will give appropriate weight to the desire of many countries to preserve the memory of individuals and families who figured prominently in the building of the national State.

The use of titles can be adapted to take account of the legal equality of women. Even within the tradition of a title, a change of facts may warrant a change in discriminatory rules. For example, in an age of national armies, it is no longer expected that a titleholder must have the ability to fight on the battlefield. (Admittedly, Jeanne d'Arc might suggest a wider range of reference as well.)

In its accession to modern human rights treaties, Spain recognized the difficulties posed by automatic male preference. Spain ratified the International Covenant on Civil and Political Rights on 27 July 1977. Spain also approved the Convention on the Elimination of All Forms of Discrimination Against Women on 16 December 1983. In the latter accession, Spain made a single reservation that has importance here. Spain noted that the Convention shall not affect the constitutional provisions concerning succession to the Spanish crown. This unique protection for royal succession was not accompanied by any other similar reservation concerning lesser titles.

Spain did not make any similar reservation to the International Covenant on Civil and Political Rights in 1977. Still, good practice would suggest that Spain should be given the benefit of the same reservation in the application of the Covenant, in light of the Committee's later interpretation of article 26 as an independent guarantee of equal protection of the law. But the bottom line is that, even with this reservation, Spain did not attempt to carve out any special protection to perpetuate gender discrimination in the distribution of other aristocratic titles.

It is not surprising that a State party should see the inheritance of the throne as posing a unique question, without intending to perpetuate any broader practice of placing women last in line. Indeed, we have been reminded by the incumbent King of Spain that even a singular and traditional institution such as royalty may be adapted to norms of equality. King Juan Carlos recently suggested that succession to the throne of Spain should be recast. Under Juan Carlos' proposal, after his eldest son completes his reign, the son's first child would succeed to the throne, regardless of whether the child is a male or a female. In an age when many women have served as heads of State, this suggestion should seem commendable and unremarkable.

In its judgement of 20 June 1987, upholding the equal claim of female heirs to non-royal titles, the Supreme Court of Spain referenced the Convention on the Elimination of All Forms of Discrimination against Women, as well as article 14 of the 1978 Spanish Constitution. In its future deliberations, Spain may also wish to reference general comment No. 18 of the Human Rights Committee, which states that article 2 of the Covenant "prohibits discrimination in law or in fact in any field regulated and protected by public authorities". And it is worth recalling that under the rules of the Committee, the disposition of any particular communication does not constitute a formal precedent in regard to any other communication or review of country reports.

The hereditary title in question here has been represented by the State party as "devoid of any material or legal content" and purely *nomen honoris* (see paragraphs 4.4 and 4.8 supra). Thus, it is important to note the limits of the Committee's instant decision. The Committee's views should not be taken as sheltering any discriminatory rules of inheritance where real or chattel property is at stake. In addition, these views do not protect discrimination concerning traditional heritable offices that may, in some societies, still carry significant powers of political or judicial decision-making. We sit as a monitoring committee for an international covenant, and cannot settle broad rules in disregard of these local facts.

(*Signed*): Ms. Ruth Wedgwood

[Adopted in English, French and Spanish, the English text being the original version. Subsequently to be issued also in Arabic, Chinese and Russian as part of the present report.]

N. Communication No. 1024/2001, *Sanles Sanles v. Spain* (Decision adopted on 30 March 2004, eightieth session)*

Submitted by:	Manuela Sanlés Sanlés (represented by Mr. José Luis Mazón Costa)
Alleged victim:	Ramón Sampedro Cameán
State party:	Spain
Date of communication:	28 March 2001 (initial submission)

The Human Rights Committee, established under article 28 of the International Covenant on Civil and Political Rights,

Meeting on 30 March 2004,

Adopts the following:

Decision on admissibility

1. The author of the communication, dated 28 March 2001, is Manuela Sanlés Sanlés, a Spanish national, who claims violations by Spain of article 2, paragraph 1, and articles 7, 9, 14, 17, 18 and 26 of the Covenant in respect of Ramón Sampedro Cameán, who declared her his legal heir. The author is represented by counsel. The Optional Protocol to the Covenant entered into force for Spain on 25 January 1985.

The facts as submitted by the author

2.1 On 23 August 1968, Ramón Sampedro Cameán, aged 25 at the time, had an accident which resulted in the fracture of a cervical vertebra and irreversible tetraplegia. On 12 July 1995, he initiated an act of non-contentious jurisdiction in the Court of First Instance in Noia, La Coruña, pleading his right to die with dignity. Specifically, he requested that his doctor should, without having criminal proceedings brought against him, be authorized to supply him with the substances necessary to end his life. On 9 October 1995, the court dismissed his request, on the ground that it was punishable under article 143 of the Spanish Criminal Code as the offence of aiding and abetting suicide, carrying a penalty of 2 to 10 years' imprisonment.

2.2 Ramón Sampedro lodged an appeal with the Provincial High Court in La Coruña, which rejected it on 19 November 1996, confirming the decision of the Court of First Instance.

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* The following members of the Committee participated in the examination of the present communication: Mr. Abdelfattah Amor, Mr. Nisuke Ando, Mr. Prafullachandra Natwarlal Bhagwati, Mr. Alfredo Castillero Hoyos, Ms. Christine Chanet, Mr. Franco Depasquale, Mr. Maurice Glèlè Ahanhanzo, Mr. Walter Kälin, Mr. Ahmed Tawfik Khalil, Mr. Rafael Rivas Posada, Sir Nigel Rodley, Mr. Martin Scheinin, Mr. Ivan Shearer, Mr. Hipólito Solari Yrigoyen, Mr. Roman Wieruszewski and Mr. Maxwell Yalden.

2.3 On 16 December 1996, Ramón Sampedro lodged an application for *amparo* (constitutional protection) with the Constitutional Court, pleading a violation of his dignity and his rights to the free development of his personality, to life, to physical and psychological integrity, and to a fair trial. The appeal was accepted for consideration on 27 January 1997, and the 20-day period for Mr. Sampedro to formulate his final arguments commenced on 10 March 1997.

2.4 In the early hours of 12 January 1998, Ramón Sampedro committed suicide, with the help of persons unknown. Criminal proceedings were instituted against the person or persons who may have aided and abetted his death. The case was dismissed, however, since no person could be identified as responsible.

2.5 The author of the communication was named as Ramón Sampedro's heir in his will. On 4 May 1998, she sent a letter to the Constitutional Court, claiming the right to continue the proceedings brought by the alleged victim, and reworded the pleadings of the application for *amparo*. The new contention was that the Provincial High Court should have acknowledged Mr. Sampedro's right to have his own doctor supply to him the medication necessary to help him to die with dignity.

2.6 On 11 November 1998, the Constitutional Court decided to dismiss the case, and to refuse the author the right to pursue the proceedings. Among its arguments the Court stated that, although the right of heirs to continue the proceedings of their deceased relatives in cases of civil protection of the right to honour, personal and family privacy and image was acknowledged in the Spanish legal system, in the case of Mr. Sampedro there were no specific or sufficient legal conditions which justified the author's continuing the proceedings. The Court also stated that the matter could not be identified with the rights cited by her, in view of the eminently personal nature, inextricably linked to the person concerned, of the claimed right to die with dignity. It further considered that the voluntary act in question concerned the victim alone and that the appellant's claim had lapsed from the moment of his death. It went on to point out that this conclusion was reinforced by the nature of the remedy of *amparo*, which was established to remedy specific and effective violations of fundamental rights.

2.7 On 20 April 1999, the author applied to the European Court of Human Rights pleading violation of the right to a life of dignity and a dignified death in respect of Ramón Sampedro, the right to non-interference by the State in the exercise of his freedom, and his right to equal treatment. The European Court pronounced the application inadmissible *ratione personae*, on the ground that the heir of Ramón Sampedro was not entitled to continue his complaints. With reference to the alleged excessive duration of the proceedings, the European Court stated that, even if the author could be considered a victim, in the circumstances the duration of proceedings had not been so great as to lead to the conclusion of a clear violation of the Convention; it accordingly declared the complaint manifestly ill-founded.

The complaint

3.1 The author argues that, in considering the intervention of a doctor to help Mr. Ramón Sampedro to die as an offence, the State party was in breach of the latter's right to privacy without arbitrary interference, as provided for in article 17 of the Covenant. The author contends that, as the alleged victim stated in his book, he requested euthanasia for himself alone and not for other persons, and that accordingly the interference of the State in his decision was unjustified.

3.2 The author contends that the State's "criminal interference" in Ramón Sampedro's decision constituted a violation of his right not to be subjected to inhuman or degrading treatment, as provided for in article 7 of the Covenant; the tetraplegia from which he suffered had considerable repercussions on his daily life as he was never able to get up. He required the assistance of other persons in order to eat, dress himself and attend to all his needs, including the most intimate; and the lack of mobility to which circumstances condemned him entailed accumulated and unbearable suffering for him. The author contends that, although in this case the suffering was not caused directly by the voluntary intervention of a State agent, the conduct of the State organs was not neutral, since a criminal provision prevented Mr. Sampedro from ending his life with the assistance that was essential in order to enable him to achieve his purpose. The author stresses that the situation created by the State party's legislation constituted ill-treatment for Ramón Sampedro and caused him to lead a degrading life.

3.3 The author asserts that there has been a violation of article 6 of the Covenant, arguing that life as protected by the Covenant refers not only to biological life, under any circumstances, but to a life of dignity, in contrast to the humiliating situation Mr. Sampedro suffered for over 29 years. She maintains that the right to life does not mean the obligation to bear torment indefinitely, and that the pain suffered by Ramón Sampedro was incompatible with the notion of human dignity.

3.4 The author maintains that article 18, paragraph 1, of the Covenant has been violated, and asserts that Ramón Sampedro's decision was based on freedom of thought and conscience and the right to manifest his personal beliefs through practices or deeds. She claims that Mr. Sampedro was reduced to "*enslavement to a morality he did not share, imposed by the power of the State, and forced to exist in a state of constant suffering*".

3.5 The author maintains that article 9 of the Covenant has been violated in that the liberty of the individual may only be restricted if the law establishes such restrictions and only when they constitute necessary means of protecting public security, order, health or morals or the rights or fundamental freedoms of others. She asserts that State interference in Mr. Sampedro's decision cannot be equated with any of these hypotheses, and furthermore, the right to freedom must be envisaged as the right to do anything that does not impair the rights of others; the alleged victim requested euthanasia only for himself and not for others, for which reason the interference of the State in his decision was unjustified.

3.6 The author maintains that the right to equal protection of the law as set out in article 2, paragraph 1, and in article 26 of the Covenant has been violated. In her opinion, it is paradoxical that the State should respect the decision of a person committing suicide but not that of disabled persons. She argues that any self-sufficient person who is mobile and experiences extreme suffering is able to commit suicide and will not be prosecuted if he does not succeed, unlike a person whose range of action is severely restricted, as in the case of Ramón Sampedro, who was reduced to complete immobility and could not be assisted, on pain of criminal prosecution. In the author's opinion, this constitutes discrimination vis-à-vis the law. She considers that the State, as the embodiment of the community, has the obligation to be understanding and to act humanely with a sick person who does not wish to live, and must not punish any person who assists him in carrying out his determination to die; otherwise, it incurs the risk of an unjust difference of treatment with regard to a person who is capable of action and wishes to die.

3.7 The author states that article 14 of the Covenant was violated because the Constitutional Court refused to acknowledge her legitimacy in the proceedings regarding Mr. Sampedro. She claims compensation from the State for the violations of the Covenant perpetrated against Mr. Sampedro when he was alive.

The State party's observations on admissibility and the merits

4.1 The State party, in its written submission dated 2 January 2002, maintains that the communication is inadmissible under article 5, paragraph 2 (a), of the Optional Protocol, on the ground that the communication submitted to the Committee on this occasion concerns exactly the same matter as was submitted by the same person to the European Court of Human Rights. It adds that the inadmissibility decision by the European Court in this matter was not a mere formality, but was reached after a genuine examination of the merits, since the Court examined the nature of the right claimed by Mr. Sampedro when he was alive, i.e. the right to assisted suicide without criminal repercussions.

4.2 According to the State party, the author of the communication wishes the Committee to review the decision on the merits previously adopted by another international body, and to find, contrary to the decision of the European Court of Human Rights, that "the right to die with dignity" or "assisted suicide without criminal repercussions" requested by Mr. Sampedro before his voluntary death is not an eminently personal or non-transferable right. It adds that the Spanish Constitutional Court was unable to take a decision on the matter because of the voluntary death of Mr. Sampedro, which caused the abatement of the *amparo* proceedings.

4.3 The State party recalls that Ramón Sampedro's heir has expressly asserted that he "died with dignity", that no one has been or is currently being prosecuted or charged for assisting him to commit suicide, and that the criminal proceedings initiated have been dismissed. In the State party's view, the author's complaint is pointless since it is neither legally nor scientifically possible to recognize a dead person's right to die.

4.4 In its observations dated 13 April 2002, the State party maintains that the author is exercising an *actio popularis* by claiming that the so-called right "to die with dignity" should be pronounced in respect not of herself but of a deceased person. It adds that the author's claims distort the rights recognized in the Covenant. It affirms that, according to the judgement of the European Court in the *Pretty v. United Kingdom* case,[1] the right to life could not, without a distortion of language, be interpreted as conferring the diametrically opposite right, namely, a right to die, whether at the hands of a third person or with the assistance of a public authority.

The author's comments on admissibility and the merits

5.1 In her written statement dated 11 July 2002, the author maintains that the European Court did not examine the merits of the case but, on the contrary, emphasized that the prime complaint concerning the State's interference in Ramón Sampedro's decision to die in peace was not examined, since it considered that his heir and sister-in-law was exercising an *actio popularis*. For that reason, it refused her the right to pursue the action, considering the complaint incompatible *ratione personae*.

5.2 The author is of the opinion that the European Court only examined the merits of the case in respect of the complaint concerning the undue length of the proceedings; with regard to her other arguments, she observes that, according to the Committee's jurisprudence,[2] a matter declared inadmissible by the European Court on grounds of form is not a matter "examined" within the meaning of article 5, paragraph 2 (a), of the Optional Protocol. She adds that the European Court further did not examine the complaint concerning the right to freedom.

5.3 The author asserts that she is not exercising an *actio popularis* since she is the successor of the victim who died without reparation or response as to the merits of his case. She adds that she was denied the right to continue the case initiated by Ramón Sampedro during his lifetime by an arbitrary decision of the Constitutional Court.

5.4 The author maintains that article 9, paragraph 7, of the Civil Procedure Act permits, without exceptions, the continuation of proceedings on the death of the complainant if the heir comes to court with a new power of attorney, as happened in her case. Under article 661 of the Civil Code, "the heirs succeed the deceased solely as a result of his death in respect of all his rights and obligations".

5.5 Article 4 of Organization Act No. 1/1982 clearly states: "*The exercise of actions for the civil protection of the honour, privacy or image of the deceased is incumbent on the person who has been designated by him for that purpose in his will*". In the case of Mr. Sampedro, a violation of the right of privacy, in relation to his private life, has been argued.

5.6 The author asserts that the Constitutional Court is applying unequal jurisprudence as regards the authorization of the continuation *mortis causa* of her status as complainant, since while she as heir of Ramón Sampedro was denied continuity, in judgement No. 116/2001 of 21 May 2001 the same chamber of the Court granted procedural continuity to the heir of a complainant who died during proceedings concerning an appeal against a measure providing for suspension of union militancy. The chamber handed down the decision in this regard despite the "eminently personal" nature of the case.

5.7 The author points out that the Committee has accepted the continuation of the proceedings by the heir of a complainant who died in the course of the proceedings, even during the phase prior to the consideration of the complaint by the Committee itself.[3] With reference to the decision in the *Pretty v. United Kingdom* case, referred to by the State party, the author points out that what Sampedro was asking for was not a positive measure on the part of the State, but that it should abstain from action and allow matters to take their course, in other words, not interfere in his decision to die.

5.8 The author contends that Ramón Sampedro died without acknowledgement of the fact that his claim to die with dignity was backed by a human right. In her view, these constitute sufficient grounds to permit his heir to continue the case. She adds that she was not granted any compensation for the suffering she had to bear.

5.9 The author makes reference to a judgement by the Constitutional Court of Colombia in 1997, concerning euthanasia, which stated that article 326 of the Colombian Criminal Code, which refers to compassionate homicide, did not criminally implicate the doctor who assisted terminally-ill persons to die if the free will of the passive subject of the act was exercised. That Court linked the prohibition of the punishment of assisted suicide to the fundamental right to a life of dignity and to protection of the independence of the individual.[4] The author asserts that the law makes progress through the search for a just and peaceful order, and that to assist someone suffering from an incurable and painful illness to die is a normal reaction of solidarity and compassion innate in human beings.

5.10 She asserts that the State party indirectly obliged Ramón Sampedro to experience the suffering entailed by immobility. A constitutional State should not be permitted to impose that burden on a disabled person, and subordinate his existence to the convictions of others. In her opinion, the interference of the State in Ramón Sampedro's right to die is incompatible with the Covenant, which in its preamble states that all the rights recognized in it derive from the inherent dignity of the human person.

5.11 As regards the alleged violation of the right not to be subjected to arbitrary interference provided for in article 17, the author asserts that, even in the *Pretty* case, the European Court acknowledged that the State's "criminal law prohibition" concerning the decision to die of a disabled person experiencing incurable suffering constituted interference in that person's privacy. Although the European Court had added that such interference is justified "for the protection of the rights of others", this argument is in her view meaningless since no harm is done to anyone and even the family tries to assist the person taking the decision to die.

5.12 In written submissions dated 22 January and 20 March 2003, the author maintains that, contrary to the assertions of the State party, Mr. Sampedro was not able to die as he wished and that his death was neither peaceful, gentle nor painless. Rather, it was distressing since he had had to resort to potassium cyanide.

Issues and proceedings before the Committee

6.1 Before considering any claims contained in a communication, the Human Rights Committee must, in accordance with rule 87 of its rules of procedure, decide whether or not it is admissible under the Optional Protocol to the International Covenant on Civil and Political Rights.

6.2 Although the State party appears to assert that the communication is inadmissible under article 1 of the Optional Protocol because the author is not a "victim" in the meaning of that provision, the Committee notes that the author seeks to act on behalf of Mr. Ramón Sampedro Cameán, who according to the author was a victim of a violation of the Covenant in that the authorities of the State party refused to allow his assisted suicide by granting protection from prosecution, to the doctor who would assist him in committing suicide. The Committee considers that the claims presented on behalf of Mr. Ramón Sampedro Cameán, had become moot prior to the submission of the communication, by the decision of Mr. Ramón Sampedro Cameán to commit, on 12 January 1998, suicide with the assistance of others, and the decision of the authorities not to pursue proceedings against those involved. Consequently, the Committee considers that at the time of submission on 28 March 2001, Mr. Ramón Sampedro Cameán could not be considered a victim of an alleged violation of his rights under the Covenant in the meaning of article 1 of the Optional Protocol. Consequently, his claims are inadmissible under this provision.

6.3 As to the author's claim that her rights under article 14 of the Covenant were violated by the denial of her right to continue the procedures initiated by Mr. Ramón Sampedro Cameán before the Constitutional Court, the Committee considers that the author not having been a party to the original *amparo* proceedings before the Constitutional Court, has not sufficiently substantiated for the purposes of admissibility the existence of a violation of article 14, paragraph 1 of the Covenant. Consequently, this part of the communication is inadmissible under article 2 of the Optional Protocol.

6.4 In the light of the conclusions reached above, the Committee need not address the State party's arguments related to article 5, paragraph 2 (a) of the Optional Protocol and the possible application of the State party's reservation to that provision.

7. The Human Rights Committee therefore decides:

(a) That the communication is inadmissible under articles 1 and 2 of the Optional Protocol;

(b) That this decision shall be communicated to the State party and to the author of the communication.

[Adopted in English, French and Spanish, the Spanish text being the original version. Subsequently to be issued also in Arabic, Chinese and Russian as part of the present report.]

Notes

[1] Judgement 2346/02 of 29 April 2002.

[2] She quotes communications Nos. 808/1998, *Georg Rogl v. Germany*, and 716/1996, *Dietmar Pauger v. Germany*.

[3] Communications Nos. 164/1984, *Croess v. Netherlands*, and 774/1997, *Brok v. Czech Republic*. Also cited is the jurisprudence of the Committee against Torture in case No. 14/1994, *M'Barek Ben v. Tunisia*.

[4] Judgement of 20 May 1997. Action for constitutional review brought by José Eurípides Parra Parra.

O. Communication No. 1040/2001, *Romans v. Canada*
(Decision adopted on 9 July 2004, eighty-first session)*

Submitted by:	Steven Romans (represented by counsel Mr. Lorne Waldman)
Alleged victim:	The author
State party:	Canada
Date of communication:	13 December 2001 (initial submission)

The Human Rights Committee, established under article 28 of the International Covenant on Civil and Political Rights,

Meeting on 9 July 2004,

Adopts the following:

Decision on admissibility

1.1 The author of the communication, dated 13 December 2001, is Mr. Steven Romans, a Jamaican national born on 30 October 1965. He is a permanent resident of Canada, however subject to a deportation order as at the time of submission of the communication. He claims that his deportation to Jamaica would constitute a violation by Canada of his rights under articles 6, 7, 10 and 23 of the Covenant. He is represented by counsel.

1.2 On 19 December 2001, the Committee, acting through its Special Rapporteur on new communications, pursuant to rule 86 of the Committee's rules of procedure, requested the State party not to deport the author to Jamaica until the Committee had considered the case.

1.3 On 26 May 2003, the Special Rapporteur on new communications decided to separate consideration of the admissibility and the merits of the case.

The facts as presented by the author

2.1 The author emigrated from Jamaica to Canada in 1967, then under 2 years old. He arrived as a permanent resident and has since retained that status. Since 1967, he has lived continuously in Canada, save for one trip to Jamaica when he was 11 years old. The author's entire family, including his mother, father and two brothers are also in Canada and have lived there for over 30 years. There are no remaining relatives in Jamaica.

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* The following members of the Committee participated in the examination of the present communication: Ms. Christine Chanet, Mr. Franco Depasquale, Mr. Maurice Glèlè Ahanhanzo, Mr. Ahmed Tawfik Khalil, Mr. Rajsoomer Lallah, Mr. Rafael Rivas Posada, Sir Nigel Rodley, Mr. Martin Scheinin, Mr. Ivan Shearer, Mr. Hipólito Solari Yrigoyen, Ms. Ruth Wedgwood and Mr. Roman Wieruszewski.

2.2 In June 1991, the author was convicted of breaking and entering with intent. In July 1992, he was convicted of trafficking in narcotics. In December 1992, he was convicted of possession of narcotics for purposes of trafficking. By 1995, he had been diagnosed to suffer from chronic paranoid schizophrenia, and to have both substance abuse and personality disorders. In December 1996, he was convicted of assault and of assault causing bodily harm.

2.3 On 7 July 1999, after a deportation inquiry, an immigration adjudicator issued a deportation order on the ground of these offences and ordered the author's deportation from Canada. On 30 November 1999, the Immigration and Refugee Board (Appeal Division) dismissed his appeal that having regard to all the circumstances of the case, he should not be removed. The Appeal Division accepted that the "probable cause" of the author's crimes was mental illness, but found that there was a "very high probability" that he would reoffend, and that his offences would be of violent nature. No medication had been demonstrated to control the mental illness, even when he was detained and medication could be administered regularly. It accepted that there would be "great emotional hardship" inflicted on his family in the event of deportation, but found, on balance of probabilities, that there would not be undue hardship upon him in that event.

2.4 On 11 June 2001, the Federal Court (Trial Division) dismissed the author's application for judicial review of the Appeal Division's decision. The Court considered that it was not a violation of fundamental justice, contrary to section 7 of the Canadian Charter of Rights and Freedoms,[1] to deport a permanent resident who had resided in Canada since early childhood and had no establishment outside of Canada, and where the permanent resident suffered from a serious mental illness so serious that he was unable to function in society. The Court also rejected the contention that the Appeal Division's findings of fact were patently unreasonable.

2.5 On 18 September 2001, the Court of Appeal dismissed the author's appeal against the Federal Court's decision, holding that the author's circumstances did not give him an absolute right to remain in Canada. The Appeal Division had properly balanced the competing interests before it and could, on the evidence, justifiably conclude that deportation was in accordance with principles of fundamental justice. On 29 November 2001, an Immigration Officer refused the author's application to remain in Canada on humanitarian and compassionate grounds. On 6 December 2001, the Supreme Court rejected the author's application for leave to appeal, with costs.

2.6 At the time of the submission of the communication, the author had initiated an application for judicial review of the Immigration Officer's decision, as well as an application to reopen the appeal of the deportation order to the Appeal Division. However, none of these proceedings had the effect of automatically staying the deportation order.

The complaint

3.1 Counsel contends that the author's deportation would violate articles 6, 7, 10 and 23 of the Covenant, observing that a State's right to deport a non-citizen is not absolute, but subject to restrictions under international human rights law. He refers to the Committee's Views in *Winata v. Australia*,[2] as well as the jurisprudence of the Committee against Torture under article 3 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.

3.2 On articles 6, 7 and 10, counsel contends it is clear that the author is mentally incompetent to act on his own and to care for himself, a fact recognized by the Appeal Division. In contrast to the medical facilities available in Canada, deportation to Jamaica would leave the author with virtually no treatment facilities. Bellevue Hospital in Jamaica had advised that it could not treat violent patients, and such persons are placed in regular prison facilities. There are substantial grounds to believe that due to the author's mental illness and the state of Jamaican prisons, he would be subjected to physical and emotional abuse. Counsel contends that Jamaica has a long history of mistreating the mentally ill, from targets of random violence by police to inhuman treatment in correctional facilities and lack of rehabilitative treatment. His family thus fears for his life and physical integrity. Counsel invokes the judgement of the European Court of Human Rights in *D. v. United Kingdom*,[3] where it was held that to expel a non-citizen enjoying AIDS treatment to a country without care facilities amounted to a breach of article 3 of the European Convention; he maintains that the present case is even stronger in light of the duration and width of the author's family in Canada.

3.3 On article 23, counsel contends that there are no grounds upon which a limitation on the author's rights to family life and protection of the family can be justified. In counsel's view, the author does not represent a threat to society, as found by the Appeal Division. His longest criminal sentence did not exceed 12 months. Two drug convictions resulted from sales to finance his own habit, three sexual assault convictions only resulted in a suspended sentence, while eight convictions concerned non-compliance with court orders. The person most harmed by these offences is the author himself, rather than others. He remains in need of a treatment plan to allow him to function properly in Canadian society, and will remain in detention, under psychiatric treatment, until this has been achieved.

3.4 The author's removal would leave his family, who care deeply for him, without a son and brother and cause grief and loss. Maintaining close family ties is particularly important to people of colour, given difficulties in Canadian society. His family, willing and able to support the author in Canada, would be unable to do so in Jamaica. Deportation would be equivalent to exile, given the length of his residence in Canada. Counsel refers to jurisprudence of the European Court, pursuant to which expulsion of long-term residents with strong family ties must be particularly justified.[4] He argues that deportation of the author in view of his mental illness, inability to care for himself, absence of other family and non-serious offending would be disproportionate.

The State party's submissions on the admissibility of the communication

4.1 By submissions of 16 May 2002, the State party disputed the admissibility of the communication, contending that it was inadmissible for failure to exhaust domestic remedies and, with respect to articles 6 and 10, for lack of substantiation.

4.2 On exhaustion of domestic remedies, the State party argued that the author was currently pursuing two remedies which, if successful, would allow him to remain in Canada. Firstly, upon application by a permanent resident prior to a deportation, the independent Appeal Division could reopen an appeal and exercise its discretion in a different way. On 13 December 2001, the author had filed a motion for reopening, which was granted on 24 January 2002. A date for hearing of the reopened appeal had not been set. Applications for judicial review of any adverse decision would lie, with leave, to the Federal Court, and in turn to the Court of Appeal and the Supreme Court. Stays preventing deportation may be sought at these points. Secondly, as to the 'eview proceedings concerning the decision of the Immigration Officer, the Federal d granted leave to apply for judicial review on 20 March 2002. The substantive on for judicial review would be heard on 12 June 2002, and any adverse decision would ilable as described. A positive decision would result in the case being sent back for ination.

As the Committee has repeatedly held that judicial review constitutes an available and remedy,[5] the State party considered the communication to be inadmissible.

While not admitting a prima facie violation of articles 7 and 23, issues in relation to re currently before domestic tribunals, the State party argued that the claims under 5 and 10 were unsubstantiated, for purposes of admissibility. The author had presented nce that death would be a necessary and foreseeable consequence of a return to Jamaica, alleged deterioration of his condition after return was largely speculative. The ons under article 6 were not materially different to the claims under article 7, which were y sub judice. In terms of article 10, the author made no allegation of mistreatment in n custody, while his allegation of detention in a Jamaican penitentiary and abuse there culative. Again, these claims were also subsumed under the article 7 issues presently ce.

By further submission of 20 August 2002, the State party noted that the author's ion for judicial review of the Immigration Officer's decision had been heard as ed, while his appeal against deportation was scheduled for hearing by the Appeal on 6 September 2002. Either of these decisions could give rise to appeal, with stays on on being available pending the appeal. Thus, the author was not presently at risk of , as no final and enforceable removal order is in place. Given the requirement to exhaust c remedies prior to submission of a communication, the communication should thus be l inadmissible.

hor's comments

On 14 March 2003, counsel responded to the State party's admissibility submissions, that, at the time of submission, all foreseeable remedies had been exhausted: the e Court had dismissed the application for judicial review, while immigration officials der no obligation to consider the then pending application for humanitarian and sionate consideration prior to deportation. After the issuance of interim measures, had obtained leave of the Appeal Division to reconsider its decision. The Appeal n then reconfirmed, on 3 January 2003, its decision to dismiss the application. Counsel plied for judicial review in the Federal Court of that decision, while the Federal Court's n on the application for judicial review of the Immigration Officer's decision was still waited. Accordingly, counsel sought a three-month deferral of a determination of bility to await these decisions.

nentary submissions by the parties

By submission of 10 September 2003, the State party advised that on 28 May 2003, the ad been granted leave to apply for judicial review of the Appeal Division's dismissal of or's fresh appeal. On 6 August 2003, this appeal, which included a constitutional ge to the relevant legislation, was heard and judgement was reserved. In the second proceedings concerning judicial review of the Immigration Officer's decision remained outstanding. Accordingly, both sets of domestic proceedings remained afoot and the communication should be declared inadmissible.

6.2 By submission of 13 October 2003, the State party advised that the Federal Court had, on 6 October 2003, granted the author's application for judicial review of the Immigration Officer's decision on his application to remain in Canada on humanitarian and compassionate grounds. Accordingly, the application had been remitted for reconsideration by a different immigration officer. The State party thus argued that the author continues to have failed to exhaust domestic remedies, and the communication is inadmissible.

6.3 By letter of 27 October 2003, the author responded arguing that an application to remain on humanitarian and compassionate grounds is not an effective remedy, as it takes several years to be considered, is discretionary on the part of the immigration officer, and would, in the present case, anyway have to be refused on the grounds that the author is inadmissible in Canada as a result of his convictions. With respect to the ongoing judicial review proceedings concerning the Appeal Division's dismissal of the reopened appeal, the author observes that three levels of the Canadian courts have already determined "on virtually the same facts" that his removal would be consistent with Canadian law. In any event, the outstanding judicial review proceedings do not operate to block removal.

6.4 By submission of 3 March 2004, the State party advised that on 29 December 2003, the Federal Court granted the author's application for judicial review of the Appeal Division's dismissal of his reopened appeal. The State party's Government waived its right to appeal the decision, with the result that the appeal will be remitted to the Appeal Division for redetermination by a differently constituted panel. The State party also advised that the author's application to remain in Canada on humanitarian and compassionate grounds was still outstanding, and that for both reasons the communication remains inadmissible for failure to exhaust domestic remedies. No further comment has been received from the author.

Issues and proceedings before the Committee

7.1 Before considering any claim contained in a communication, the Human Rights Committee must, in accordance with rule 87 of its rules of procedure, decide whether or not the communication is admissible under the Optional Protocol to the Covenant.

7.2 The Committee recalls that its assessment of the requirement to exhaust available and effective domestic remedies, as required by article 5, paragraph 2 (b), of the Optional Protocol takes place at the time of its consideration of the communication. The Committee observes that according to the most recent information before it the author's appeal has been remitted to the Appeal Division. An adverse decision by that body would itself be subject to judicial review in the courts. Accordingly, the communication is inadmissible on the ground of failure to exhaust domestic remedies.

7.3 In the light of this finding, the Committee need not examine further arguments as to the admissibility of the communication, including the extent to which an application to remain on humanitarian and compassionate grounds should be considered a remedy which must be exhausted for purposes of article 5, paragraph 2 (b), of the Optional Protocol.

8. The Committee therefore decides:

(a) That the communication is inadmissible under article 5, paragraph 2 (b), of the Optional Protocol;

(b) That this decision shall be communicated to the author and to the State party.

[Adopted in English, French and Spanish, the English text being the original version. Subsequently to be issued also in Arabic, Chinese and Russian as part of the present report.]

Notes

[1] Section 7 provides: "Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice."

[2] Case No. 930/2000, Views adopted on 16 August 2001.

[3] Application 30240/1996, judgement of 2 May 1997.

[4] *Beldjoudi v. France*, application No. 12083/86, judgement of 26 March 1992.

[5] See, for example, *Badu v. Canada*, case No. 603/1994, *Nartey v. Canada*, case No. 604/1994 and *Adu v. Canada*, case No. 654/1995, decisions adopted on 18 July 1997.

P. Communication No. 1045/2002, *Baroy v. The Philippines* (Decision adopted on 31 October 2003, seventy-ninth session)*

Submitted by:	Mr. Alfredo Baroy (represented by counsel, Mr. Theodore Te)
Alleged victim:	The author
State party:	The Philippines
Date of communication:	4 January 2002 (initial submission)

The Human Rights Committee, established under article 28 of the International Covenant on Civil and Political Rights,

Meeting on 31 October 2003,

Adopts the following:

Decision on admissibility

1.1 The author of the communication, dated 4 January 2002, is Alfredo Baroy, a Philippine national allegedly born on 19 January 1984 and thus aged 17 at the time of submission of the communication. At that time, he was detained on death row at New Bilibid Prisons, Muntinlupa City. He claims to be a victim of violations by the Philippines of article 6, in particular paragraphs 2, 5 and 6, article 10, paragraph 3, article 14, in particular paragraph 4, and article 26 of the Covenant. He is represented by counsel.

1.2 On 9 January 2002, the Committee, acting through its Special Rapporteur on new communications, pursuant to rule 86 of the Committee's rules of procedure, requested the State party not to carry out the death sentence against the author, while his case was under consideration by the Committee. The Special Rapporteur on new communications further requested the State party speedily to determine the age of the author and meanwhile to treat him as a minor, in accordance with the provisions of the Covenant.

The facts as presented by the author

2.1 On 2 March 1998, a woman was raped three times. The author and an (adult) co-accused were thereafter charged with three counts of rape with use of a deadly weapon contrary to article 266A (1),[1] in conjunction with article 266B (2),[2] of the Revised Penal Code. It is alleged that on the date of the offence, the author would have been 14 years, 1 month and 14 days old, by virtue of being born on 19 January 1984.

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* The following members of the Committee participated in the examination of the present communication: Mr. Nisuke Ando, Mr. Prafullachandra Natwarlal Bhagwati, Mr. Alfredo Castillero Hoyos, Ms. Christine Chanet, Mr. Franco Depasquale, Mr. Maurice Glèlè Ahanhanzo, Mr. Walter Kälin, Mr. Ahmed Tawfik Khalil, Mr. Rafael Rivas Posada, Sir Nigel Rodley, Mr. Martin Scheinin, Mr. Ivan Shearer, Mr. Roman Wieruszewski and Mr. Maxwell Yalden.

2.2 At trial, the defence introduced the issue of minority through the author, who claimed to have been born in 1982. The trial court instructed the appropriate government agencies to submit evidence on his true age. Three documents were submitted. A Certificate of Live Birth listed the date as 19 January 1984, while a Certificate of Late Registration of Birth showed the date as 19 January 1981, and an Elementary School permanent record as 19 January 1980. The trial court considered, in the light of the author's physical appearance, that the author's true date of birth was 19 January 1980, thus making him over 18 years of age at the time the offence was committed.

2.3 On 20 January 1999, the author and his (adult) co-accused were each convicted of three counts of rape with a deadly weapon and sentenced to death by lethal injection. In imposing the maximum penalty available, the Court considered that there were the aggravating circumstances of night-time and confederation, and no mitigating circumstances. By way of civil liability, each was further sentenced to pay, in respect of each count, PHP 50,000 in indemnity, PHP 50,000 in moral damages and PHP 50,000 in civil damages. On 4 January 2002, the communication was submitted to the Committee.

2.4 On 9 May 2002, the Supreme Court, on automatic review, affirmed the conviction but reduced the penalty from death to *reclusion perpetua*, on the basis that no aggravating circumstances had been sufficiently alleged and proven to exist. On the contrary, the trial court had overlooked a mitigating circumstance of "accidental" (that is, non-habitual) intoxication. As to the issue of minority, the Court considered that the record showed that the author had been coached by his mother to lie about it, and thus, having been "obviously fabricated", minority had not been made out.

2.5 The author subsequently filed a partial motion for reconsideration of the 9 May 2002 judgement, reiterating his claim of minority as a privileged mitigating circumstance. The motion was based on a purported certificate of live birth, certified as a true copy by the Office of the Civil Registrar General, showing that the author was born on 19 January 1984 (and making him 14 years of age at the time of the commission of the offence).

The complaint

3.1 The author claims to have been a victim of a violation of article 6, paragraph 2, both alone and in conjunction with paragraph 6. The author explains that following the constitutional abolition of capital punishment in 1987, the Congress in 1994 reintroduced the death penalty by electrocution through the Republic Act 7659. This legislation made, inter alia, rape by use of deadly weapon or by two or more persons, a death-eligible offence (that is, the death penalty was the maximum penalty but not mandatory). The mode of death was changed to lethal injection and the range of offences was subsequently expanded by legislation. Up to 2000, seven individuals were executed. In 2000, the former President imposed a temporary moratorium. No concrete moves to repeal or review the death penalty were undertaken over this period. In 2001, the current President revoked the moratorium and announced that executions would resume. The author argues, as a result, that article 6, paragraph 2, in conjunction with paragraph 6, prohibits the re-imposition of the death penalty, once abolished. In addition, the offence for which the author was convicted was not a "most serious crime", as required by article 6, paragraph 2, of the Covenant.

3.2 The author claims a violation of article 10, paragraph 3, as after his conviction he was detained on death row with other convicts sentenced to death, regardless of his age. He was not accorded special treatment as a minor and was detained with adult criminals.

3.3 The author further claims a violation of article 14, in particular paragraph 4. He was not accorded a separate procedure that would protect his rights considering his legal status as a minor. No preliminary determination was made as to his minority, with the trial court simply placing the burden of proof on the defence. Despite evidence from State authorities that the author was either born in 1981 or 1984, in either case making him a minor at the time of commission of the offence, the trial court arbitrarily determined his birth year as 1980, thus making him 18 years at the time of the offence.

3.4 The author finally claims a violation of article 26, in that his age was arbitrarily determined to be 18, despite evidence of his birth being either in 1981 or 1984. The trial court refused to treat him as a minor and singled him out with the intention of arbitrarily determining the year of his birth, contrary to the evidence presented.

3.5 By way of relief, the author petitioned the Committee to request, through interim measures of protection, the State party speedily to determine his age and urgently to transfer to an appropriate facility, consistent with his status as a minor, until he reached majority. As to issues on the merits, he requested the Committee to declare (i) his three death sentences, imposed upon a minor at time of commission of the offences, to be contrary to article 6, paragraph 5, (ii) his detention on death row, as a minor, without regard to his legal status as such, to be contrary to article 10, paragraph 3, (iii) the failure to consider his legal status as a minor during the trial to be contrary to article 14, paragraph 4, and (iv) the re-imposition of capital punishment and the declared policy of the President to carry it out to be contrary to article 6, paragraph 2, in conjunction with paragraph 6. He petitioned the Committee to request the State party to take all appropriate action on the death sentences imposed upon him, consistent with its own laws on juvenile offenders and its obligations under the Covenant.

The State party's submissions on admissibility and merits

4.1 By note verbale of 9 July 2002, the State party contested the admissibility of the communication. The State party argues that, as the author's appeal was pending before the Supreme Court at the time of submission of the communication, his complaints were "by and large speculative and premature" and the communication was inadmissible for failure to exhaust domestic remedies.

4.2 In addition, the State party argues that the Supreme Court's decision of 9 May 2002 "can very well result in the case before the HRC being considered moot". The Court, for reasons other than alleged minority, reduced the sentence to *reclusion perpetua*. For that reason, the claims with respect to the validity of the death penalty law should be deemed moot. It also rejected the claim of minority, finding it "obviously fabricated" as a result of his mother's coaching. The State party points out that as the author subsequently filed a partial motion for reconsideration of the 9 May 2002 judgement, reiterating his claim of minority as a privileged mitigating circumstance, the claim continues to be pending and should be dismissed for non-exhaustion of domestic remedies.

The author's comments

5.1 By letter of 26 May 2003, the author rejected the State party's arguments, arguing that while a partial motion for reconsideration on the issue of minority is pending, the communication remains admissible because the Supreme Court's affirmation of the author's guilt and its failure to treat him as a minor, despite the documentary evidence presented, demonstrates that all domestic remedies have been exhausted. He submits that a remedy is not "meaningful" unless the tribunal in question is open to considering all the options. In the author's view, the fact that the Supreme Court has remained steadfast to reviewing cases based solely on the trial records presented, even in cases where a clear factual dispute is raised, shows that there is no adequate remedy left. Accordingly, the submission of the communication was not premature and should be deemed admissible.

Supplementary submissions by the parties

6.1 On 16 July 2003, the State party made additional submissions on the admissibility and the merits of the communication. As to admissibility, the State party argues, in addition to its earlier arguments, that the author cannot claim to be a "victim", as required by the Optional Protocol, as there has been no concrete application of law to his detriment. Indeed, as the 9 May 2002 decision of the Supreme Court reduced the imposed penalty to *reclusion perpetua*, the death penalty will not be imposed regardless of the author's age at the time of the offence.

6.2 As to the merits, the State party argues that the alleged violations are also premised on the author being a minor. The State party argues that the author's minority has not yet been satisfactorily proven, and refers to the brief of the Office of the Solicitor-General filed in response to the author's partial motion for reconsideration before the Supreme Court. In the brief, the Office considers itself "not in a position to state whether the certificate of live birth attached … is authentic or not", and leaves the matter to the "sound judgement" of the court. In any event, the Supreme Court has already rejected the author's claim of minority, which finding stands until such time as the Supreme Court reverses it.

6.3 On the question of the re-imposition of the death penalty in Republic Act 7659, the State party refers to the jurisprudence of its Supreme Court that the Constitution provides for re-imposition by Congress, and further that the Act was "replete with both procedural and substantive safeguards that ensure only [its] correct application".[3] In addition, the Court held that the punishment of death is not, per se, cruel, within the meaning of the State party's Constitution. The State party also refers to the Committee's jurisprudence for the proposition that the death penalty per se is not in violation of the Covenant.[4]

6.4 As to the contention that the author should have received a specialized procedure for minors, the State party observes that the Supreme Court noted the trial court's findings of deviousness and criminal propensity on the part of the author. The State party argues that as the trial court's observations should be given weight in view of its first-hand assessment of the author, application of any "special procedure", even if he was a minor, would "clearly be prejudicial to the administration of justice".

6.5 On the question of the treatment and segregation of juvenile convicts, the State party refers to the provisions of its Child and Youth Welfare Code (Presidential Decree 603), as interpreted by the Supreme Court. Under this regime, an offender aged over 9 and under 15 years of age at the time of commission of an offence is, in the event of a finding of guilt, not convicted but rather committed to welfare custody. If, however, the offender was aged below 18 years at the time of commission of the offence but is no longer a minor at the time of trial and conviction, such a suspended sentence is unavailable.

6.6 As to whether the author's age had been arbitrarily determined, the State party recalls the author's conflicting statements to the trial court, where he stated alternately that he was 17 years old and later that he could not recall his age but had been instructed by his mother to say 17 years. As a result and in light of his appearance, the trial court solicited official documentation, which it considered before reaching a conclusion that the author was not a minor. This finding was not reversed in the Supreme Court and remains so until such time as the Court should decide otherwise.

7.1 The author did not take the opportunity afforded to him to make additional comments in response to the State party's supplementary submissions.

Issues and proceedings before the Committee

Consideration of admissibility

8.1 Before considering any claim contained in a communication, the Human Rights Committee must, in accordance with rule 87 of its rules of procedure, decide whether or not it is admissible under the Optional Protocol to the Covenant.

8.2 The Committee observes that, subsequent to the submission of the communication, the Supreme Court allowed the author's appeal and substituted a term of imprisonment in place of the sentence of death. In this respect, the Committee considers that the issues raised by the author concerning the alleged violations of article 6 of the Covenant through imposition of the death penalty in his case have become moot, in relation to article 1 of the Optional Protocol. Accordingly, while potentially relevant to the Committee's assessment of the remaining claims, these particular issues need not be further addressed by the Committee.

8.3 In spite of this conclusion with respect to the claims under article 6, the Committee observes that sentencing a person to death and placing him or her on death row in circumstances where his or her minority has not been finally determined raises serious issues under articles 10 and 14, as well as potentially under article 7, of the Covenant. The Committee observes, however, with respect to the exhaustion of domestic remedies, that the author has filed a "partial motion for reconsideration", currently pending before the Supreme Court, requesting the Court to reconsider its treatment of his minority in its judgement of 9 May 2002. The Committee recalls that its position in relation to issues of exhaustion of domestic remedies is that, absent exceptional circumstances, this aspect of a registered communication is to be assessed at the time of its consideration of the case. In the present case, accordingly, the Committee considers that the questions of the author's age and the means by which it was determined by the courts are, by the author's own action, currently before a judicial forum with authority to resolve definitively these particular claims. It follows that issues arising under articles 10 and 14 and, potentially, article 7 from the author's age and the manner in which the courts sought to determine this question are inadmissible, for failure to exhaust domestic remedies.

9. The Committee therefore decides:

(a) That the communication is inadmissible under articles 1 and 5, paragraph 2 (b), of the Optional Protocol;

(b) That this decision shall be communicated to the author and to the State party.

[Adopted in English, French and Spanish, the English text being the original version. Subsequently to be issued also in Arabic, Chinese and Russian as part of the present report.]

Notes

[1] This provision defines rape as committed "by a man who shall have carnal knowledge of woman under any of the following circumstances:

(a) through force, threat or intimidation; … ".

[2] This provision sets out: "Whenever the rape is committed with the use of a deadly weapon or by two or more persons, the penalty shall be *reclusion perpetua* to death."

[3] *People v. Echegaray* 267 SCRA 682 and *Echegaray v. Secretary of Justice* 297 SCRA 754.

[4] *Suarez de Guerrero v. Colombia*, case No. 45/1979, Views adopted on 31 March 1982.

Q. Communication No. 1074/2002, *Navarra Ferragut v. Spain* (Decision adopted on 30 March 2004, eightieth session)*

Submitted by:	Isabel Ferragut Pallach (represented by counsel Mr. Javier Bruna Reverter)
Alleged victim:	Arturo Navarra Ferragut
State party:	Spain
Date of communication:	16 October 2002 (initial submission)

The Human Rights Committee, established under article 28 of the International Covenant on Civil and Political Rights,

Meeting on 31 March 2004,

Adopts the following:

Decision on admissibility

1. The author of the communication, dated 16 October 2000, is Isabel Ferragut Pallach, a Spanish national who claims that Spain committed violations of article 7 and article 14, paragraph 1, of the International Covenant on Civil and Political Rights with respect to her son, Arturo Navarra Ferragut, who died on 27 December 1993. The author is represented by counsel. The Optional Protocol entered into force for Spain on 25 January 1985.

The facts as submitted by the author

2.1 On 3 March 1988, Arturo Navarra Ferragut, at the age of 27, suffered from obsessive neurosis, underwent radiosurgery, performed by doctors Enrique Rubio García and Benjamín Guix Melchor. In the years that followed, he gradually and irreversibly lost his vital faculties, until he died on 27 December 1993.

2.2 The author filed a complaint against the doctors with Barcelona Criminal Court No. 13, accusing them of recklessly negligent professional conduct (*imprudencia temeraria profesional*) resulting in death. In a judgement dated 14 July 1997, the Criminal Court judge acquitted the defendants because of lack of irrefutable evidence of negligent conduct.

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* The following members of the Committee participated in the examination of the present communication: Mr. Nisuke Ando, Mr. Prafullachandra Natwarlal Bhagwati, Mr. Alfredo Castillero Hoyos, Ms. Christine Chanet, Mr. Franco Depasquale, Mr. Maurice Glèlè Ahanhanzo, Mr. Walter Kälin, Mr. Ahmed Tawfik Khalil, Mr. Rafael Rivas Posada, Sir Nigel Rodley, Mr. Martin Scheinin, Mr. Ivan Shearer, Mr. Hipólito Solari Yrigoyen, Ms. Ruth Wedgwood, Mr. Roman Wieruszewski and Mr. Maxwell Yalden.

2.3 The author lodged an appeal with the Provincial High Court in Barcelona. She sought authorization for a hearing so that the appeal could be processed and settled more expeditiously. The Provincial High Court rejected her appeal in a judgement of 27 January 1998.

2.4 The author then filed an application for *amparo* with the Constitutional Court, claiming a violation of the right to effective legal protection and of the right to life and physical and moral integrity. The Court rejected the application in a decision of 13 July 1998.

2.5 She next lodged a complaint with the European Court of Human Rights claiming violations of articles 2, 3 and 8 and article 6, paragraph 1, of the European Convention for the Protection of Human Rights and Fundamental Freedoms. The European Court declared her application inadmissible in a decision of 27 April 2000.

The complaint

3.1 The author claims a violation of article 7 of the Covenant, with regard to the prohibition on being subjected to medical or scientific experimentation. She states that the treatment that caused her son's death was presented by the doctors as a remedy for psychiatric disorders, when in fact it is used to combat malignant brain tumours. She maintains that her son's case was used as a scientific experiment to examine the possibility of carrying out gamma ray radiosurgery on patients with psychiatric disorders.

3.2 The author claims a violation of article 14, paragraph 1, of the Covenant on the grounds that the Barcelona Provincial High Court did not issue a decision on her specific request that a public hearing should be held before the delivery of a judgement.

Observations by the State party on admissibility

4.1 In its submission dated 20 June 2002, the State party maintains that the communication is inadmissible under article 5, paragraph 2 (a), of the Optional Protocol on the grounds that the communication submitted to the Committee concerns exactly the same matter as that which was submitted by the same person to the European Court of Human Rights. The State party adds that the aim of the examination conducted by the European Court was to consider the procedure as a whole. It recalls that, on a number of occasions, the Committee has stated that the "same matter" concept, within the meaning of article 5, paragraph 2 (a), of the Optional Protocol, should be understood to include the same claim concerning the same individual, submitted by that individual to an international body.[1] The State party claims that confusing the "same matter" with an isolated reason for complaint implies overlooking the unitary concept of the process, which requires its comprehensive examination.

4.2 The State party asserts that, in accordance with article 795 of the Criminal Procedure Act, appeal hearings before the National High Court are held not at the request of the parties, but at the discretion of the judicial body. In accordance with this article, a hearing shall be held only "*when the High Court deems it necessary for the correct formation of a well-founded conviction*". It asserts that the High Court did not consider it necessary to hold another hearing in the author's case because one had already been held before the Criminal Court and that, furthermore, this issue was considered by the European Court. In addition, the State party maintains that the European Court also considered the arguments which the author invokes before the Committee under article 7 of the Covenant, drawing attention in that regard to the existence of a document signed by Arturo Navarra Ferragut in which he consented to the medical treatment he received.

Comments by the author on admissibility

5.1 In her submission dated 22 November 2002, the author claims that the complaints submitted to the Committee have not been raised before other international bodies. She states that, although they may have arisen during the same legal process, the facts and legal issues she is now submitting to the Committee constitute a different matter from that which she submitted to the European Court.

5.2 The author accepts that the National High Court was not obliged by law to hold a hearing in order to resolve the appeal, but submits that this does not mean that it was unable to do so, especially as the law itself provides for such a possibility. In her view, the principles of due process, effective legal protection and the right to obtain a legal judgement on the questions submitted by the parties to the courts are included in article 14, paragraph 1, and obliged the Court to issue a decision on her request, which was ignored.

Issues and proceedings before the Committee

6.1 Before considering any claims contained in a communication, the Human Rights Committee must, in accordance with rule 87 of its rules of procedure, decide whether or not it is admissible under the Optional Protocol to the Covenant.

6.2 The Committee notes that the author filed a complaint with the European Court of Human Rights, which, on 27 April 2000 declared her appeal inadmissible on the grounds that it was manifestly unfounded. The Committee notes that the European Court examined the facts that are now being presented by the author, as well as the legal procedure in its entirety. Specifically, the Court delivered a decision on the alleged failure of the National High Court to respond to the author's request for the holding of a hearing. The Court considered that the author had not proved that she had not had a fair hearing in the Spanish courts. Likewise, it took into consideration the fact that, according to the judgement of the Barcelona Criminal Court No. 13 on 14 July 1997, Arturo Navarra Ferragut had signed a document authorizing the radiosurgery treatment that was performed on him, and that the said document explicitly set out the possible side effects. In light of the above, it can be established that, although the author wishes the Committee to approach the case from a different angle from that taken by the European Court, the case addresses the "same matter" that has already been examined under another procedure of international investigation and analysed in this context. The Committee notes that while most of the authentic language versions of article 5.2 (a) of the Optional Protocol refer only to instances where the same matter is pending before another international body, the Spanish text of the said provision also relates to situations where such examination has been concluded. The Committee maintains its position that article 5.2 (a) of the Optional Protocol is to be interpreted in the light of the other authentic languages, rather than the Spanish one. However, it notes that the State party's reservation submitted in Spanish,[2] at the time of accession to the Optional Protocol, uses terminology close to the text of the Spanish version of article 5.2 (a) of the Optional Protocol. It concludes that the State party had the clear intention to extend, by way of reservation, the provision of article 5, paragraph 2 (a), of the

Optional Protocol to cover communications the consideration of which has been completed under another international procedure. The communication must therefore be declared inadmissible under article 5, paragraph 2 (a), of the Optional Protocol, as modified by the State party's reservation.

7. The Human Rights Committee therefore decides:

(a) That the communication is inadmissible under article 5, paragraph 2 (a), of the Optional Protocol;

(b) That this decision shall be communicated to the author and, for information purposes, to the State party.

[Adopted in English, French and Spanish, the Spanish text being the original version. Subsequently to be issued also in Arabic, Chinese and Russian as part of the present report.]

Notes

[1] This has been the tenor of the Committee's decisions on communications Nos. 808/1998, *Rolg and daughter v. Germany,* and 744/1997, *Linderholm v. Croatia.*

[2] The original text in Spanish reads: "El Gobierno español se adhiere al Protocolo Facultativo del Pacto Internacional de Derechos Civiles y Políticos, interpretando el artículo 5, párrafo 2, de este Protocolo, en el sentido de que el Comité de Derechos Humanos no considerará ninguna comunicación de un individuo a menos que se haya cerciorado de que el mismo asunto no ha sido sometido o no esté siendo sometido a otro procedimiento de examen o arreglo internacionales".

R. Communication No. 1084/2002, *Bochaton v. France* (Decision adopted on 1 April 2004, eightieth session)*

Submitted by:	Lionel Bochaton (represented by counsel, Mr. Alain Lestourneaud)
Alleged victim:	The author
State party:	France
Date of communication:	11 April 2002 (initial submission)

The Human Rights Committee, established under article 28 of the International Covenant on Civil and Political Rights,

Meeting on 1 April 2004,

Adopts the following:

Decision on admissibility

1. The author of the communication is Mr. Lionel Bochaton, a French citizen residing in Saint-Paul-en-Chablais, France. He claims to be a victim of violations by France of article 14, paragraphs 1, 2 and 3 (c), of the International Covenant on Civil and Political Rights. He is represented by counsel.

The facts as submitted by the author

2.1 On 28 November 1996, following an investigation by the gendarmerie, the author was charged with indecent exposure by the examining magistrate of the Thonon-les-Bains regional court.

2.2 By court order of 11 June 1997, the examining magistrate referred the author's case to the criminal court on the grounds that "the investigation had brought to light sufficient evidence to show that, during the summer of 1996 and up to 21 September 1996, Lionel Bochaton had, by walking around naked in a place open to public view, engaged in acts of indecent exposure in Vacheresse".

2.3 By order issued on 1 July 1997 by the public prosecutor, the author was indicted on these charges before the regional criminal court in Thonon-les-Bains.

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* The following members of the Committee participated in the examination of the present communication: Mr. Nisuke Ando, Mr. Alfredo Castillero Hoyos, Mr. Franco Depasquale, Mr. Maurice Glèlè Ahanhanzo, Mr. Walter Kälin, Mr. Ahmed Tawfik Khalil, Mr. Rafael Rivas Posada, Sir Nigel Rodley, Mr. Martin Scheinin, Mr. Ivan Shearer, Mr. Hipólito Solari Yrigoyen, Mr. Roman Wieruszewski and Mr. Maxwell Yalden.

Under rule 85 of the Committee's rules of procedure, Ms. Christine Chanet did not participate in the examination of the present communication.

2.4 By judgement dated 17 September 1997, the court acquitted the author of the offences with which he had been charged for lack of evidence.

2.5 On 24 September 1997 the public prosecutor appealed this judgement.

2.6 By decision of 30 June 1999, the Chambéry Court of Appeal struck down the judgement and sentenced the author to three months' imprisonment (suspended) for indecent exposure and to five years' deprivation of civil and family rights.

2.7 On 1 July 1999 the author filed an application for review of this decision in the Court of Cassation.

2.8 In a judgement of 13 September 2000, the Criminal Division of the Court of Cassation rejected the appeal.

The complaint

3.1 The author claims he is not guilty of the offences with which he is charged, namely, acts of indecent exposure.

3.2 The author's complaint concerns the criminal proceedings which resulted in his conviction and, in this regard, he alleges the following:

> The imprecision of the charges: the indictment served by the prosecution in the Thonon-les-Bains regional court failed to cite specific events or dates, as shown by the vagueness and lack of detail in expressions such as "during the summer of 1996 and up to 21 September 1996" and "repeatedly";
>
> Disregard of the principle of the presumption of innocence: the vagueness of the charges meant that the author himself was obliged to establish the dates of the offences of which he was accused;
>
> Absence of any legal grounds for the conviction: the author considers that the domestic courts found him guilty of indecent exposure without providing any evidence thereof;
>
> Violation of the right to a defence and to a fair trial: the indictment delivered in the Chambéry Court of Appeal made no mention of article 131-26 of the Criminal Code, which provides for a further penalty of deprivation of civil and family rights, even though that penalty was imposed by the court;
>
> The undue length of the proceedings: the appeal stage lasted 1 year, 9 months and 6 days, which the author considers excessive, inasmuch as the case was tried in 1 month and 11 days (hearing on 19 May 1999 and decision on 30 June 1999).

3.3 In conclusion, the author claims a violation of article 14, paragraphs 1, 2 and 3 (c), of the International Covenant on Civil and Political Rights.

3.4 The author states that all domestic remedies have been exhausted and indicates that the matter has not been submitted to any other procedure of international investigation or settlement.

State party's observations on admissibility

4.1 In its observations of 14 August 2002, the State party challenges the admissibility of the communication.

4.2 In respect of the allegation of unduly lengthy proceedings, the State party maintains that the author has not exhausted all domestic remedies.

4.3 In the first place, according to the State party, the author has not availed himself of the remedy provided under article L 781-1 of the Judicial Code, which stipulates: "The State is required to make good any damage caused by the improper administration of justice. Such liability is incurred only in the event of gross negligence or a denial of justice." Proceedings brought by private individuals against the State under this article fall within the jurisdiction of the ordinary courts of justice. The State party points out that, in a decision dated 7 November 2000 in cases Nos. 44952/98 and 44953/98, submitted by Ms. Van Der Kar and Ms. Lissaur Van West, the European Court of Human Rights acknowledged the admissibility of an appeal based on article L 781-1 of the Judicial Code, thereby accepting "the French Government's contention that it is now well established in domestic case law that an appeal based on article L 781-1 of the Judicial Code provides a remedy for an alleged violation when domestic procedures have been exhausted". According to the State party, the Court recognized that, in the wake of the decision handed down by the Paris Court of Appeal on 20 January 1999 and subsequent judgements by other courts, this remedy could be effectively used to contest the length of both civil proceedings (cf. the rulings handed down by the Paris regional court on 9 June and 22 September 1999 in *Quillichini and Legrix de la Salle*) and criminal proceedings (cf. the judgements handed down by the Lyon Court of Appeal, the *Association Défense Libre* decision of 27 October 1999, and by the Aix-en-Provence Court of Appeal, the *Lagarde* decision of 14 June 1999). In the case at hand, the European Court had before it a complaint concerning unduly lengthy proceedings that was submitted pursuant to the provisions of article 6, paragraph 1, of the European Convention on Human Rights, the wording of which is similar to that of article 14 of the Covenant. Mutatis mutandis, the State party is of the view that this case law can be equally applied by the Human Rights Committee. The State party points out that, in the present case, the author submitted his communication to the Committee on 11 April 2002, i.e. after the Paris Court of Appeal judgement and the other French rulings under article L 781-1 of the Judicial Code relating to the length of proceedings. The State party therefore considers that the author had every opportunity to learn about the existence and effectiveness of that remedy.

4.4 Secondly, the State party argues that the author's statement of claim to the Court of Cassation contained no allegation of unduly prolonged proceedings. The State party recalls that, according to the jurisprudence of the Human Rights Committee, the author must have brought a substantive complaint in the domestic courts in respect of any allegation subsequently referred to. The State party recalls that, in communication No. 661/1995 (*Paul Triboulet v. France*), the Committee found the claim of excessively lengthy examination and judicial proceedings inadmissible for non-exhaustion of domestic remedies, on the grounds that the author had not brought that claim before the Court of Cassation.

4.5 With regard to the complaints concerning the vagueness of the indictment, disregard of the principle of presumption of innocence and the absence of any legal grounds for the conviction, the State party is of the view that the author is in fact attempting to challenge his conviction. According to the State party, the author asserts in support of his allegations that, in finding him guilty, the judges reversed the burden of proof: "The approach adopted by the appeal court judges was to confuse the issue by muddling the dates of the events and the witnesses' statements, while failing to provide objective and verifiable evidence to support each individual act." In this regard, the State party recalls that, according to the Committee's jurisprudence, the Committee may not consider facts or evidence submitted to the domestic courts unless it is clear that their evaluation was arbitrary or amounted to a denial of justice. In the State party's view, however, the judgement handed down by the Chambéry Court of Appeal is extensively reasoned and shows that every point in the case has been considered. The State party considers that there can be no serious question of arbitrary treatment or a denial of justice. Moreover, the State party says that, in the view of the Criminal Division of the Court of Cassation - as expressed in its reply to the second appeal, which covers the three complaints raised before the Committee - "(...) applications which merely seek to question the Court's final decision on the merits of the events and circumstances of the case and on the evidence argued in the presence of both parties shall not be deemed admissible".

4.6 With regard to the complaint concerning the indictment before the Chambéry Court of Appeal, the State party considers that the author has not exhausted domestic remedies insofar as he did not challenge the indictment either in the Chambéry Court of Appeal or in the Court of Cassation. Indeed, according to the State party, at no time did the author allege before the Court of Cassation any violation of the provisions of article 14 of the Covenant on the grounds that his indictment before the appeal court had failed to mention article 131-26 of the Criminal Code or even the principle involved.

Author's comments on the State party's observations concerning admissibility

5.1 In his letter of 8 November 2002, the author contests the State party's arguments.

5.2 With regard to the allegation that the proceedings were unduly prolonged, the author maintains that article L 781-1 of the Judicial Code in fact establishes a highly restrictive, or even unworkable, form of State responsibility. The author further considers that the solution adopted by the European Court of Human Rights, cited by the State party, contradicts its own case law. According to the author, requiring claimants to avail themselves of the restrictive, ineffective remedy provided under article L 781-1 of the Judicial Code before any application to the Committee would prolong the proceedings in the domestic courts beyond all reason and deprive the Committee of any effective oversight of the guarantees afforded under article 14, paragraph 3 (c), of the Covenant. Lastly, the author points out that the aforementioned decision of the European Court was handed down on 7 November 2000, or subsequent to the period covered by this case and to the 13 September 2000 ruling of the Court of Cassation.

5.3 As to the complaints concerning the vagueness of the charges, disregard of the principle of the presumption of innocence and the absence of any legal basis for the conviction, the author argues that it is universally recognized that, in criminal cases, the accused has the right to be provided with detailed information concerning acts of which he has been accused and on which the charges are based. In his view, convicting a person for offences committed on an unspecified date, as in the present case, amounts to arbitrary treatment. Given the potentially serious consequences of a criminal conviction, the author stresses that States have a duty to ensure that charges are quite specific. Otherwise the accused is forced to prove that he or she did not engage in such acts. This shifting of the burden of proof, the author believes, amounts to an arbitrary disregard of the principle of the presumption of innocence.

5.4 As to the complaint concerning the indictment before the Chambéry Court of Appeal, the author states that he sought to challenge not the indictment itself but the fact that he had been sentenced to a further penalty that was not mentioned in the indictment read out in the Chambéry Court of Appeal. The author argues that he could not be expected to point to the invalidity of an indictment that failed to invoke article 131-26 of the Criminal Code, which provided for further penalties, since that oversight meant that the Court of Appeal would be unable to apply that provision. In his view, it was hardly in his interest to draw attention to the invalidity of an indictment that excluded the possibility of invoking a particular criminal law in his case. It was only when the decision of the domestic court was read out that he realized that he had been arbitrarily sentenced to a penalty that the indictment had failed to mention, and this deprived him of any possibility of mounting a defence on that point.

Issues and proceedings before the Committee concerning admissibility

6.1 Before considering any claim contained in a communication, the Human Rights Committee must, in accordance with rule 87 of its rules of procedure, decide whether or not it is admissible under the Optional Protocol to the Covenant.

6.2 The Committee has ascertained, as required under article 5, paragraph 2 (a), of the Optional Protocol, that the same matter is not being examined under another procedure of international investigation or settlement.

6.3 With regard to the complaint that the proceedings were unduly prolonged, the Committee takes note of the State party's argument that no appeal had been brought under article L 781-1 of the Judicial Code in respect of the alleged violation, and that the author did not raise the issue before the Court of Cassation. The Committee also notes the author's contention that the remedy provided under article L 781-1 of the Judicial Code is restrictive and ineffective. In the Committee's view, the author has failed to substantiate sufficiently his arguments in rebuttal of the State party's claim that article L 781-1 of the Judicial Code provided an effective remedy. It further notes that the author does not contest the fact that his complaint was never raised before the Court of Cassation. Lastly, it considers that the allegation of unduly lengthy proceedings has not been sufficiently substantiated. The Committee therefore considers that this part of the communication is inadmissible under article 2 and article 5, paragraph 2 (b), of the Optional Protocol.

6.4 As to the complaints concerning the vagueness of the charges, disregard of the principle of the presumption of innocence and the absence of any basis in law for the conviction, the Committee recalls that, according to its jurisprudence, it is generally for the courts of States parties to the Covenant to evaluate facts and evidence in a particular case. In considering allegations of violations of article 14 in this regard, the Committee may only establish whether the conviction was arbitrary or amounted to a denial of justice. The material before the Committee does not show that the courts' assessment of the evidence suffered from such defects. Accordingly, this part of the communication has not been sufficiently substantiated, for the purposes of admissibility, and is thus inadmissible under article 2 of the Optional Protocol.

6.5 As to the complaints relating to the indictment delivered before the Chambéry Court of Appeal, after having considered the arguments of the State party and the author, the Committee finds that the author did not, in his statement of claim to the Court of Cassation, refer to the alleged violation arising from his sentencing, on appeal, to further penalties despite the fact that the indictment failed to invoke article 131-26 of the Criminal Code, which provides for such penalties. The Committee therefore finds this part of the communication inadmissible under article 5, paragraph 2 (b), of the Optional Protocol.

Accordingly, the Committee declares these complaints inadmissible pursuant to articles 2 and 5, paragraph 2 (b), of the Optional Protocol.

7. The Committee therefore decides:

(a) That the communication is inadmissible under articles 2 and 5, paragraph 2 (b), of the Optional Protocol;

(b) That this decision shall be communicated to the State party and to the author.

[Adopted in English, French and Spanish, the French text being the original version. Subsequently to be issued also in Arabic, Chinese and Russian as part of the present report.]

S. Communication No. 1106/2002, *Palandjian v. Hungary* (Decision adopted on 30 March 2004, eightieth session)*

Submitted by:	Rebecca Palandjian and her brother Aghabab Paladjian (not represented by counsel)
Alleged victim:	The authors
State party:	Hungary
Date of communication:	21 June 1999 (initial submission)

The Human Rights Committee, established under article 28 of the International Covenant on Civil and Political Rights,

Meeting on 31 March 2004,

Adopts the following:

Decision on admissibility

1.1 The authors of the communication are Ms. Palandjian and her brother Aghabab Palandjian,[1] Hungarian citizens by birth but American citizens since 1966, and are currently residing in the United States. They claim to be victims of violations of the Covenant on Civil and Political Rights. The authors are not represented by counsel.

1.2 The Optional Protocol to the International Covenant on Civil and Political Rights entered into force for Hungary on 7 December 1988.

The facts as submitted by the authors

2.1 In 1952, the property of the authors' father in Budapest, which he co-owned with his brother, was nationalized by the former communist regime. In the same year, the family went to live in Austria. In 1960, the authors' father, an Armenian/Iranian citizen, died and the authors emigrated to the United States.

2.2 In 1991, the Hungarian authorities adopted Act No. XXV of 1991 (hereafter referred to as the "Compensation Act"), providing partial compensation for property that had been nationalized during the communist regime. According to paragraph 2 of this law, the following persons were entitled to compensation: (1) Hungarian citizens; (2) former Hungarian citizens; and (3) foreign citizens who were residents of Hungary on 31 December 1990.

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* The following members of the Committee participated in the examination of the present communication: Mr. Nisuke Ando, Mr. Prafullachandra Natwarlal Bhagwati, Mr. Alfredo Castillero Hoyos, Mr. Maurice Glèlè Ahanhanzo, Mr. Walter Kälin, Mr. Ahmed Tawfik Khalil, Mr. Rafael Rivas Posada, Sir Nigel Rodley, Mr. Martin Scheinin, Mr. Ivan Shearer, Mr. Hipólito Solari Yrigoyen, Ms. Ruth Wedgwood, Mr. Roman Wieruszewski and Mr. Maxwell Yalden.

2.3 On 11 December 1992 and 30 April 1993, the Hungarian consulate in New York replied to inquiries from Ms. Palandjian about her entitlement to compensation, explaining that she was ineligible, as her father was not a person entitled under the Compensation Act, since he was not a Hungarian citizen at the time of nationalization.

2.4 On 16 March 1993, the Budapest Loss Settlement Office rejected Ms. Palandjian's request for compensation, as her father did not meet the criteria established in the Compensation Act. On 29 April 1993, she filed an appeal against this decision. On 2 May 1996, the National Loss Settlement and Compensation Office affirmed the decision of the Budapest Loss Settlement Office. On 1 April 1998, the Pest District Court confirmed the decision of the Budapest Loss Settlement Office.

2.5 In or around 1994, Ms. Palandjian requested advice from the Chief Secretary of the Constitutional Court. By letter of 21 November 1994, the Chief Secretary explained that an appeal to that Court had to challenge the constitutionality of an act where there was no other legal remedy available and that her request for a mere opinion on a legal question fell outside the remit of the Court. Ms. Palandjian did not pursue a constitutional action, as she had received advice from a lawyer in 1990 that he required a deposit of $240,000 to pursue an application to the Constitutional Court.

2.6 On 26 February 1999, an application by Ms. Palandjian to the European Court of Human Rights was declared inadmissible, in the light of all the materials in its possession, and insofar as the matters complained of were within its competence, the Court found that they did not disclose any appearance of a violation of the rights and freedoms set out in the Convention to its Protocols.

The complaint

3.1 The authors state that they have not made an application to the Constitutional Court as the cost would be prohibitive. In view of this, they claim to have exhausted all domestic remedies.

3.2 The authors claim that their right to property was violated, as the Hungarian authorities failed to return their father's property to them or to compensate them for the nationalization of his property in 1952.

3.3 The authors also claim that they were discriminated against as they did not receive compensation for the loss of their father's property due to the fact that their father was not a Hungarian citizen at the time of nationalization and therefore did not fulfil the criteria of the 1991 Compensation Act.

The State party's submission on admissibility

4.1 By submission of 8 October 2002, the State party submits that insofar as Ms. Palandjian refers to a violation of her right to property, this claim falls outside the scope of the Covenant and is therefore inadmissible *ratione materiae*, pursuant to article 3 of the Optional Protocol. Insofar as she alleges that she has been discriminated against in respect of compensation for her father's nationalized property, it submits that this claim is inadmissible under articles 2 and 5, 2 (b), of the Optional Protocol, as she has failed to exhaust available domestic remedies.

4.2 The State party contends that the claim that Ms. Palandjian was discriminated against by the Compensation Act, in not being granted partial compensation for the loss of her deceased father's property, has never been raised before the competent national authorities, notably not before judicial organs. As shown by the documents submitted by her, she filed a request for compensation with the Budapest Loss Settlement Office. This request was rejected on 16 March 1993 on the ground that she did not qualify for compensation because "at the time of the injury the owner was not a Hungarian citizen, as required by section 2, 1 (b) of the Compensation Act". According to the State party, only Aghabab Palandjian appealed this decision to the National Loss Settlement and Compensation Office and subsequently requested judicial review of this decision. Ms. Palandjian, it submits, neither appealed this decision to the National Loss Settlement and Compensation Office, nor requested judicial review in accordance with section 10 of the Compensation Act.

4.3 The State party argues that Ms. Palandjian did not file a constitutional complaint in which she could have raised the issue of alleged discrimination. It explains that the right to non-discrimination is guaranteed under article 70/A of the Hungarian Constitution, which is interpreted by the Constitutional Court in accordance with international treaties, including the provisions of the Covenant. The State party argues that Ms. Palandjian could have availed herself of two remedies to test the constitutionality of the impugned Act. Firstly, and assuming she had appealed her case to the National Loss Settlement and Compensation Office, she could have submitted a complaint to the Constitutional Court under section 48 of Act No. XXXII of 1989.[2] Secondly, and without requiring the exhaustion of all other legal remedies, she could have filed a motion in the Constitutional Court contesting the constitutionality of the Compensation Act on the basis of alleged discrimination. In either case and in the event that the Court found that the restrictions concerning the scope of persons entitled to compensation were discriminatory, it could have repealed the contested legal provisions.

4.4 The State party submits that Ms. Palandjian could have initiated a civil action against the Hungarian authorities for discrimination on the ground of nationality, relying on section 76 of the Civil Code and article 26 of the Covenant, which was incorporated into Hungarian law by Law-Decree No. 8 of 1976 and is therefore directly applicable in the domestic courts. Had she done so, she could have been awarded compensation, or the court could have requested the Constitutional Court to examine the constitutionality of the Compensation Act.

Authors' comments

5. On 22 January 2003, the authors reiterate their previous claims and deny that they failed to exhaust available domestic remedies. They claim that the application of remedies has been unreasonably prolonged and is too expensive, and that they were informed by the legal department of the compensation office that it would be impossible to receive compensation under the current law. They submit that for the purposes of Ms. Palandjian their request for advice from the Chief Secretary of the Constitutional Court was sufficient to exhaust domestic remedies.

Issues and proceedings before the Committee

6.1 Before considering any claim contained in a communication, the Human Rights Committee must, in accordance with rule 87 of its rules of procedure, decide whether or not the communication is admissible under the Optional Protocol to the Covenant.

6.2 The Committee notes that the European Court of Human Rights already examined the facts of this case and found "that they do not disclose any appearance of a violation of the rights and freedoms set out in the Convention to its Protocols". However, it also notes that as the European Court has already examined the facts of this case it is presently not being examined under another procedure of international investigation or settlement for the purposes of article 5, paragraph 2 (a), of the Optional Protocol, and therefore cannot be declared inadmissible on this count.

6.3 Concerning the authors' claim relating to the confiscation of their father's property, the Committee observes that the right to property is not expressly protected under the Covenant. The allegation concerning a violation of the authors' right to property per se is thus inadmissible *ratione materiae*, under article 3 of the Optional Protocol.

6.4 The Committee notes the authors' claim that they were victims of discrimination, in violation of article 26 of the Covenant, as they were refused compensation on the ground that their deceased father was not a Hungarian citizen at the time of the nationalization of his property. In this regard, it notes that although both authors appear to have appealed the decisions of the Budapest Loss Settlement Office to the National Loss Settlement and Compensation Office, they have not shown that any arguments relating to alleged discrimination were ever raised before any domestic court. Noting that the author has not provided any substantiation for her contention that the cost of exhausting domestic remedies would have been prohibitive, the Committee therefore decides that this claim is inadmissible due to non-exhaustion of domestic remedies, under article 5, paragraph 2 (b), of the Optional Protocol.

7. The Human Rights Committee therefore decides:

(a) That the communication is inadmissible under articles 3, and 5, paragraph 2 (b), of the Optional Protocol;

(b) That this decision shall be communicated to the author and, for information, to the State party.

[Adopted in English, French and Spanish, the English text being the original version. Subsequently to be issued also in Arabic, Chinese and Russian as part of the present report.]

Notes

[1] Aghabab Palandjian has severe muscular degeneration which prevents him from being able to see or to read or write. He has given authorization to his sister to act on his behalf.

[2] This section of the Act states "(1) Whoever suffered a violation of his rights enshrined in the Constitution on account of the application of an unconstitutional provision and exhausted all other legal remedies or there are no such remedies available to him, may submit a constitutional complaint to the Constitutional Court ...".

T. Communication No. 1115/2002, *Petersen v. Germany* (Decision adopted on 1 April 2004, eightieth session)*

Submitted by:	Mr. Werner Petersen (represented by counsel, Mr. Georg Rixe)
Alleged victim:	The author
State party:	Germany
Date of communication:	31 January 2002 (initial submission)

The Human Rights Committee, established under article 28 of the International Covenant on Civil and Political Rights,

Meeting on 1 April 2004,

Adopts the following:

Decision on admissibility

1. The author of the communication is Werner Petersen, a German national, who claims to be a victim of a violation by Germany[1] of articles 2, paragraphs 1 and 3, 3, 14, 17 and 26 of the Covenant. He is represented by counsel.

The facts as submitted by the author

2.1 The author is the father of a child born out of wedlock on 3 May 1985. He lived with the child's mother, Ms. B, from May 1980 to November 1985. They agreed that the son would bear the mother's surname. After separation from the mother, the author continued to pay maintenance and had regular contact with his son until autumn 1993. In August 1993, the mother married Mr. K., and took her husband's name in conjunction with her own surname, i.e. B.-K.

2.2 In November 1993, the author asked the Youth Office of Bremen whether the mother had applied for a change of his son's surname. By letter of 20 December 1993, he was advised that she had enquired about the possibility, but that no request had been filed yet. In his letter, the competent Youth Office official informed the author that, should such a request be lodged, he would agree to a change of surname, as the stepfather had been living together with the mother and the son for more than one year and since the child fully accepted him.

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* The following members of the Committee participated in the examination of the present communication: Mr. Abdelfattah Amor, Mr. Nisuke Ando, Mr. Prafullachandra Natwarlal Bhagwati, Ms. Christine Chanet, Mr. Franco Depasquale, Mr. Maurice Glèlè Ahanhanzo, Mr. Walter Kälin, Mr. Ahmed Tawfik Khalil, Mr. Rafael Rivas Posada, Sir Nigel Rodley, Mr. Martin Scheinin, Mr. Ivan Shearer, Mr. Hipólito Solari Yrigoyen, Mr. Roman Wieruszewski and Mr. Maxwell Yalden.

On 30 December 1993, the mother and her husband recorded statements at the Bremen Registry Office, to the effect that they gave their family name (K.) to the author's son. They also filed a document issued by the Bremen Youth Office, on 29 December 1993, on behalf of the son (then 8 years old), according to which he agreed to the change of his surname. The Bremen Registry Office informed the Helmstedt Registry Office accordingly, following which the registrar of the Helmstedt Registry Office added the change of the child's surname to his birth record.

2.3 On 6 April 1994, the author filed an action with the Administrative Court of Bremen against the Bremen Municipality, complaining that the Bremen Youth Office had failed to hear him about the envisaged change of his son's surname. On 19 May 1994, the Administrative Court of Bremen declared itself incompetent to deal with the action and transferred the case to the District Court of Braunschweig.

2.4 On 21 October 1994, the Braunschweig District Court dismissed the author's claim for rectification of his son's birth record, insofar as the change of his surname was concerned. The Court found that the entry was correct because the child's surname had been changed in accordance with s. 1618[2] of the Civil Code. It considered that this section did not amount to a violation of the non-discrimination provision of the German Constitution or of article 8 of the European Convention on Human Rights. On balance, s. 1618 of the Civil Code did not affect the equality between children born out of wedlock and children born in wedlock. Rather, in providing for the possibility of having the same surname, s. 1618 ensured that the child's status - born out of wedlock - was not disclosed to the public. As far as procedural matters were concerned, the proceedings for a change of surname in which the natural father did not participate could not be objected to on constitutional grounds. In particular, there was no breach of the author's rights as a natural parent, since his son had never borne the father's surname. The change of surname served the best interests of the child. A right of the natural father to be heard in the proceedings, as argued by the author, without the possibility to block a change of surname would not be effective, as mother and stepfather would have the final say in any event.

2.5 On 4 January 1995, the Regional Court of Braunschweig dismissed the author's appeal, confirming the reasoning of the District Court and holding that there were no indications that the legal provisions applied in the present case were unconstitutional. The change of surname served the interests of the child's well-being, which prevailed over the interests of the natural father.

2.6 On 10 March 1995, the Higher Regional Court of Braunschweig dismissed the author's further appeal. Relying on the case law of the Federal Constitutional Court, it reiterated that s. 1618 of the Civil Code could not be objected to on constitutional grounds. The author could not derive from his rights as a natural father any right to be heard in proceedings about the change of his child's surname, because his rights conflicted with those of the mother and, in particular, of the child, whose protection was the provision's paramount objective. The child's interests were safeguarded by the Youth Office's participation in the proceedings. If the child's mother, her husband and the guardian agreed on the change of the child's surname, this change would generally have to be considered to be in the interest of the child's well-being.

2.7 In January 1994, as a result of problems in having access to his son, the author applied to the Bremen District Court for a decision granting him a direct right of access to his son. In April 1994, by interlocutory decision, the District Court granted him visiting rights. Subsequently, the child's mother did not comply with the decision and prohibited visits from October 1994.

2.8 On 3 January 1995, the author instituted proceedings against the mother before the Bremen District Court, claiming compensation for lost travel expenses caused by her refusal to allow him access to his son on 16 October and 13 November 1994.

2.9 On 5 April 1995, after an oral hearing, the Bremen District Court dismissed the author's action. It found that there was no legal basis to claim compensation for the mother's alleged refusal to grant him access to his son. The Court noted that, pursuant to s. 1711 of the Civil Code, the person with custody and care of a child born out of wedlock determines contact arrangements with the father, and that the father can only claim personal contacts if they are in the child's interest. The Court also observed that its interlocutory decision of April 1994 on visiting arrangements had been formulated as granting the child a right to visit the author, not in terms of awarding a right of access to the author.

2.10 On 17 August 1995, the Federal Constitutional Court dismissed the author's constitutional complaints against the decisions in both sets of proceedings (change of his son's surname; rejection of his compensation claim). It found that, in both cases, the conditions of admissibility had not been met. In particular, the Court considered that the author's complaint about the change of his son's surname did not raise any question of fundamental importance. Referring to its decision of 7 March 1995 in another matter,[3] it recalled that the father of a child born out of wedlock enjoyed the right to the care and upbringing of the child under the Basic Law, even if he was not living with the child's mother and was not raising the child together with her. However, in the present case, there was no indication that the courts, in interpreting and applying s. 1618 of the Civil Code, had disregarded the author's parental rights. As to the Bremen District Court's decision of 5 April 1995, the Court considered that the author had no constitutional claim for his parental right to access to his child to be enforced by means of a tort action.

2.11 On 8 February 1996, the author submitted an application to the European Court of Human Rights, claiming violations of his and his son's rights under articles 6, 8 and 14 of the European Convention on the Protection of Human Rights and Fundamental Freedoms (European Convention). On 6 December 2001, the European Court declared the application inadmissible[4] on the following grounds: (1) author's lack of standing to act on his son's behalf; (2) incompatibility *ratione materiae* with the provisions of the Convention of his claim that the proceedings concerning the change of his son's surname had discriminated against him as a natural father, thereby infringing article 14 of the Convention; and (3) as manifestly ill-founded, insofar as the author alleged: (a) that the change of his son's surname violated his right to respect for family life under article 8 of the Convention; (b) that the absence of an oral hearing and a public pronouncement of the decisions in the proceedings before the Bremen Administrative Court and the Braunschweig District and Regional Courts violated article 6 of the Convention; and (c) that the dismissal of his compensation claim not only failed to enforce his visiting rights, but also discriminated against him, if compared to fathers of children born in wedlock, in violation of article 8, *juncto* article 14, of the Convention.

The complaint

3.1 The author alleges a violation of his rights under articles 2, paragraphs 1 and 3; 3, 14, 17 and 26 of the Covenant, because his interests as the natural father had not been duly taken into account, given that neither his consent, nor his participation were required in the proceedings to change his son's surname. He explicitly states that he is not submitting the communication on his son's behalf.

3.2 The author claims that, by contrast to a father of a child born in wedlock, he did not have the benefit of a public authority having to justify the change of the child's name by an important reason related to the child's well-being. He feels discriminated against in comparison to the child's mother or the father of a child born in wedlock, who must be heard in the proceedings under the Change of Surnames Act. Moreover, unlike the father of a child born in wedlock, he had no effective access to the courts to contest the decision of the guardian, the mother and her husband concerning the change of surname for lack of important reasons, incompatibility with the child's interest, or failure to be heard in the change of name proceedings.

3.3 The author submits that the change of his son's surname serves no legitimate aim, since the child's well-being generally requires continuity of name as a means of personal identification. Concealing an illegitimate birth by change of name was not a legitimate purpose. Furthermore, representation by the guardian does not sufficiently safeguard the child's interests, as the Youth Office regularly hears only the mother and her husband and not the child himself.

3.4 The author alleges that the Bremen District Court's decision of 5 April 1995 violates his rights under articles 2, 3, 17 and 26 of the Covenant, as it fails to ensure his right of access to his son. He adds that the father of a child born in wedlock is entitled to compensation if the mother refuses to comply with his right of access.

3.5 The author claims that the European Court of Human Rights, in its inadmissibility decision of 6 December 2001, did not "consider" his claims within the meaning of the State party's reservation to article 5, paragraph 2 (a), of the Optional Protocol. If there is a material difference between the applicable provisions of the Covenant and the European Convention, and if a matter has been declared inadmissible *ratione materiae* by the European Court, that matter has not been "considered" within the meaning of the German reservation, in accordance with the Committee's jurisprudence in *Rogl v. Germany*[5] and in *Casanovas v. France*.[6]

3.6 As to his claims under article 26 of the Covenant, the author submits that the European Court has held that the change of his son's surname and the denial of compensation for his lost travel expenditures did not directly affect his right to family life (article 8 of the Convention), so that there was no room for the application of article 14, which could be applied solely in relation to the substantive rights and freedoms of the Convention. Unlike article 14 of the European Convention, article 26 is a free-standing provision, which could be invoked independently of the other Covenant rights. In the light of the material difference between both provisions, the Committee was not precluded by the German reservation from considering his claims based on article 26 of the Covenant.

3.7 Regarding his claims under article 17 of the Covenant, the author argues that the European Court's finding that his right to respect for family life was not affected by the change of his son's surname or the denial of his compensation claim, shows that the Court has found these claims to fall outside the ambit of article 8 of the Convention, thereby not considering them within the meaning of the German reservation. Moreover, the Court had failed to consider his claim under article 14 of the Convention that, in comparison to fathers of children born in wedlock, he had no access to the courts to challenge the change of name as not being in the child's interest or for not having been heard in the relevant proceedings.

3.8 With regard to the State party's reservation *ratione temporis,* the author submits that the change of his son's surname had its origin on 30 December 1993, when the mother and her husband recorded their statements at the Bremen Registry Office, which then informed the Helmstedt Registry Office, whose registrar added the change of name to the child's birth certificate. The compensation proceedings before the Bremen District Court related to his lost travel expenditures on 16 October and 13 November 1994, given the mother's refusal to let him visit his son. These events occurred after the entry into force of the Optional Protocol for the State party on 25 November 1993.

3.9 The author argues that the German reservation concerning article 26 of the Covenant is incompatible with the object and purpose of the Optional Protocol, if not the Covenant itself, as it seeks to limit the State party's obligations under article 26 in a manner inconsistent with the Committee's interpretation of that provision as a free-standing principle of equality.[7] By reference to the Committee's general comment 24,[8] its jurisprudence in *Kennedy v. Trinidad and Tobago,*[9] as well as articles 2, paragraph 1 (d), and 19 of the Vienna Convention on the Law of Treaties, he argues that no reservation can be made to a substantive obligation under the Covenant through the vehicle of the Optional Protocol. He recalls that the Committee had expressed regrets about the State party's reservation in its concluding observations on the fourth periodic report of Germany.

3.10 The author submits that the Committee is competent to determine whether a reservation is compatible with the object and purpose of the Covenant and that the effect of any finding that the German reservation is incompatible with the object and purpose of the Optional Protocol is that it will be generally severable, in the sense that the Covenant will be operative for the State party without the benefit of the reservation.[10] For him, the State party has no legitimate interest in upholding its reservation, after having signed[11] Protocol No. 12 to the European Convention, which contains a general prohibition of discrimination. The author concludes that the reservation is invalid and does not preclude the Committee from examining his claims under article 26.

State party's observations on admissibility

4.1 On 1 November 2002, the State party submitted its observations on the admissibility of the communication, arguing that, on the basis of the German reservation, it is inadmissible *ratione materiae* and because of the prior consideration of the same matter by the European Court of Human Rights.

4.2 The State party argues that an isolated invocation of articles 3 and 26 of the Covenant is incompatible with the wording of article 3 and with the German reservation to article 26, given the accessory character of both provisions. Insofar as the author alleges a violation of these provisions alone, his communication must be considered *ratione materiae* incompatible with the provisions of the Covenant. By invoking these provisions separately from articles 14 and 17 of the Covenant, the author seeks to circumvent litera a) of the German reservation, as both claims are identical and based on the same arguments which already were considered by the European Court of Human Rights. The mere formulation of a complaint as an isolated claim of discrimination, concerning the same matter and based on identical arguments as a previous application to the European Court, should not undermine the application of the German reservation, whose purpose was to prevent duplication of international control procedures, conflicting decisions under such procedures and "forum shopping" by complainants.

4.3 The State party adds that the European Court has "considered" the same matter, since its decision that the author's claims were inadmissible *ratione materiae* or manifestly ill-founded in both cases implied a summary examination of the merits of his application. The Committee's decision in *Casanovas v. France* must be distinguished from the present case, since the scope of protection of article 6 of the European Convention differs in substance from that of article 14 of the Covenant, as regards the issue decided in that case. That the European Court declared the application inadmissible *ratione materiae* was therefore not decisive for the Committee's finding that the same matter had not been "considered" by the Court. Rather, the additional requirement of a comparable degree of protection of the rights in question had not been met in *Casanovas*. However, in the present case, the author has failed to demonstrate an essential material difference between the Covenant rights invoked by him and their counterparts in the European Convention.

4.4 With regard to the author's specific claims, the State party submits that the European Court examined whether the change of his son's surname affected his right to respect for family life under article 8 of the European Convention; it also examined the substantive prerequisites of article 14 of the Convention, and came to a negative conclusion in both cases. As a result of this consideration, the Committee was precluded from examining the author's identical claims under article 17, read in conjunction with article 26 of the Covenant, in the absence of a material difference with articles 8 and 14 of the European Convention.

4.5 Regarding the author's claims under article 14, read in conjunction with article 26, that the proceedings relating to the change of his son's surname were unfair and that, as the father of a child born out of wedlock, he had no opportunity to contest the name change, the State party submits that the European Court declared these complaints inadmissible as manifestly ill-founded, after comprehensively examining the merits of the claims under articles 6 and 8 of the European Convention. The Committee's competence to examine the same matter was therefore precluded by virtue of the German reservation.

4.6 Lastly, with regard to the author's claim under article 17, read in conjunction with article 26, of the Covenant, that the denial of compensation for his loss of travel expenditures discriminated against him in comparison to fathers of children born in wedlock and did not ensure his right of access to his son, the State party submits that the European Court considered this complaint to be primarily a financial matter, which fell outside the scope of protection of article 8 of the European Convention.

Comments by the author

5.1 On 20 February 2003, the author reaffirmed that the communication is admissible for the reasons set out in his initial submission. He emphasizes that his free-standing claims of discrimination have not, and could not have been, considered by the European Court, in accordance with the established case law of the Court.[12] Therefore, the Committee was not precluded from examining these claims on the basis of the State party's reservation to article 5, paragraph 2 (a), of the Optional Protocol.

5.2 For the author, the State party failed to address his argument that the German reservation to article 26 of the Covenant is incompatible with the object and purpose of the Covenant and thus severable. He submits that, in its fifth periodic report[13] to the Human Rights Committee, the State party indicates that it would review this part of the reservation once ratification of Protocol No. 12 to the European Convention, containing a general prohibition of discrimination, was completed. In the author's view, this supports his assumption that the State party has no legitimate interest to uphold the reservation.

Issues and proceedings before the Committee

6.1 Before considering any claim contained in a communication, the Human Rights Committee must, in accordance with rule 87 of its rules of procedure, decide whether or not the communication is admissible under the Optional Protocol to the Covenant.

6.2 The Committee notes that the State party has invoked its reservation to article 5, paragraph 2 (a), of the Optional Protocol, precluding the Committee from examining communications "which have already been considered under another procedure of international investigation or settlement". The Committee is satisfied that consideration by the European Court of Human Rights constitutes an examination by another procedure of international investigation or settlement within the meaning of article 5, paragraph 2 (a), of the Optional Protocol.

6.3 The Committee observes that litera a) of the State party's reservation to article 5, paragraph 2 (a), must be read in the light of the wording of that provision. A communication has, therefore, already been considered by the European Court of Human Rights, if the examination by that Court related to the "same matter". The Committee recalls its jurisprudence that the "same matter" within the meaning of article 5, paragraph 2 (a), must be understood as relating to the same author, the same facts and the same substantive rights.[14] It observes that Application No. 31180/96 was submitted to the European Court by the same author, was based on the same facts and related, at least in part, to the same substantive rights as those raised in the present communication, as articles 6 and 8 of the European Convention are similar in scope and content to articles 14 and 17 of the Covenant.

6.4 Having concluded that the State party's reservation concerning article 5, paragraph 2 (a), of the Optional Protocol applies, the Committee must consider the author's argument that the European Court of Human Rights did not "consider" the same matter within the meaning of the State party's reservation. The Committee recalls its jurisprudence that where the Strasbourg organs have based a declaration of inadmissibility not solely on procedural grounds,[15] but on reasons that comprise a certain consideration of the merits of the case, then the same matter has been "examined" within the meaning of the respective reservations to article 5, paragraph 2 (a), of the Optional Protocol.[16]

6.5 Insofar as the author alleges that the change of his son's surname and the dismissal of his compensation claim violate his right to respect to family life under article 17, in conjunction with his procedural rights under article 14, of the Covenant, the Committee notes that the European Court declared the analogous complaint inadmissible as manifestly ill-founded, pursuant to article 35, paragraphs 3 and 4, of the European Convention. The Court based its finding on the fact that the child had never borne the author's surname, which therefore had never constituted an outer sign of a bond between the author and his son. With regard to the compensation claim, the Court found that the issue concerned primarily a financial matter, which did not serve to obtain a decision on access or enforcement of access to his child. Consequently, the dismissal of the compensation claim did not affect the author's right to respect for family life. The Committee concludes that, in examining the author's complaints under article 8 of the European Convention, the European Court went beyond an examination of purely procedural admissibility criteria. The same is true regarding his complaints under article 6 of the European Convention, which related to the necessity of a public hearing and the public announcement of the judgements of the Braunschweig District and Regional Courts, and thus concerned aspects of article 6 of the European Convention which are similar in content and scope to article 14 of the Covenant. This part of the communication has therefore already been "considered", within the meaning of the State party's reservation.

6.6 To the extent that the author claims, under article 26 of the Covenant, that he was discriminated against, in comparison with the child's mother or to fathers of children born in wedlock, the Committee notes that the European Court declared similar claims by the author inadmissible *ratione materiae*, since there was no room for the application of article 14 of the European Convention, as his right to respect to family life was not affected by the decisions in the change of name as well as the compensation proceedings. The Committee recalls its jurisprudence[17] that, if the rights invoked before the European Court of Human Rights differ in substance from the corresponding Covenant rights, a matter that has been declared inadmissible *ratione materiae* has not, in the meaning of the respective reservations to article 5, paragraph 2 (a), been considered in such a way that the Committee is precluded from examining it.

6.7 The Committee recalls that the independent right to equality and non-discrimination in article 26 of the Covenant provides greater protection than the accessory right to non-discrimination contained in article 14 of the European Convention.[18] It notes that, in the absence of any independent claim made under the Convention or its relevant Protocols, the European Court could not have examined whether the author's accessory rights under article 14 of the Convention had been breached. Consequently, the author's claims in relation to article 26 of the Covenant have not been considered by the European Court. It follows that the Committee is not precluded by the State party's reservation to article 5, paragraph 2 (a), of the Optional Protocol from examining this part of the communication.

6.8 The Committee recalls that not every distinction made by the laws of a State party amounts to a discrimination in the sense of article 26 but only those that are not based on objective and reasonable criteria. The author has not substantiated, for purpose of admissibility, that reasons for introducing s. 1618 into the German Civil Code (para. 2.4 above) were not objective and reasonable. Likewise, the author has not substantiated that the denial of compensation for lost travel expenses amounted to a discrimination within the meaning of article 26. Accordingly, this part of the communication is inadmissible under article 2 of the Optional Protocol to the International Covenant on Civil and Political Rights.

6.9 Under these circumstances the Committee does not need to address the permissibility and applicability of the State party's reservation to the Optional Protocol regarding article 26.

6.10 Insofar as the author alleges that he has been denied access to the German courts, in violation of article 14 of the Covenant, because, unlike fathers of children born in wedlock, he could not contest the decision to change his son's surname, nor claim compensation for the mother's failure to comply with his right of access to his son, the Committee notes that the author had access to the German courts, in relation to both matters, but that these courts dismissed his claims. It considers that he has not sufficiently substantiated, for purposes of admissibility, that his claims raise issues under article 14, paragraph 1, of the Covenant, which could be raised independently from article 26 and do not relate to matters that have already been "considered", within the meaning of the State party's reservation, by the European Court.[19]

7. The Human Rights Committee therefore decides:

(a) That the communication is inadmissible under articles 2 and 5, paragraph 2 (a), of the Optional Protocol;

(b) That this decision shall be communicated to the State party and to the author.

[Adopted in English, French and Spanish, the English text being the original version. Subsequently to be issued also in Arabic, Chinese and Russian as part of the present report.]

Notes

[1] The Covenant and the Optional Protocol to the Covenant entered into force for Germany on 17 March 1974 and 25 November 1993, respectively. Upon ratification of the Optional Protocol, the State party entered the following reservation: "The Federal Republic of Germany formulates a reservation concerning article 5, paragraph 2 (a), to the effect that the competence of the Committee shall not apply to communications (a) which have already been considered under another procedure of international investigation or settlement, or (b) by means of which a violation of rights is reprimanded having its origin in events occurring prior to the entry into force of the Optional Protocol for the Federal Republic of Germany, or (c) by means of which a violation of article 26 of the [said Covenant] is reprimanded, if and insofar as the reprimanded violation refers to rights other than those guaranteed under the aforementioned Covenant."

[2] Pursuant to section 1617 of the German Civil Code in force at the material time, a child born out of wedlock received the surname that the mother was bearing at the time of the child's birth. A subsequent change of the mother's surname as a result of marriage did not affect the child's surname.

Section 1618 of the same Code provided that the mother of a child born out of wedlock and her husband could declare, for the record of a registrar, that the child, who was bearing a surname in accordance with section 1617 and was not yet married, should in future bear their family name. Similarly, the father of the child could declare, for the record of a registrar, that the child should bear his surname. The child and the mother had to agree to the change of the surname, in case that the father wanted to give his surname to the child.

[3] Decisions of the Constitutional Court (BVerfGE), vol. 92, No. 12, at p. 158.

[4] See European Court of Human Rights (Third Section), decision as to the Admissibility of application No. 31180/96 (*Werner Petersen against Germany*), 6 December 2001.

[5] Communication No. 808/1998.

[6] Communication No. 441/1990.

[7] The author refers to communication No. 182/1984, *Zwaan-de Vries v. The Netherlands*.

[8] CCPR, fifty-second session (1994), general comment 24: Issues relating to reservations made upon ratification or accession to the Covenant or the Optional Protocols thereto, or in relation to declarations under article 41 of the Covenant, at para. 13.

[9] Communication No. 845/1998, at para. 6.

[10] The author refers to general comment 24, at para. 18, and the decision on admissibility of the Committee on communication No. 845/1998, *Kennedy v. Trinidad and Tobago*.

[11] Germany has signed Protocol No. 12 to the European Convention on 4 November 2000 but has not ratified it to date. See the Council of Europe's Treaty Office at: http://conventions.coe.int (consulted on 22 December 2003).

[12] The author refers to communication No. 965/2000, *Karakurt v. Austria*, at para. 7.4.

[13] See fifth periodic report of Germany, UN Doc. CCPR/C/DEU/2002/5, 4 December 2002, at para. 372.

[14] See e.g. communication No. 998/2001, *Althammer v. Austria*, at para. 8.4.

[15] See e.g. communication No. 716/1996, *Pauger v. Austria*, at para. 6.4.

[16] See e.g. communication No. 121/1982, *A.M. v. Denmark*, at para. 6; communication No. 744/1997, *Linderholm v. Croatia*, at para. 4.2.

[17] See e.g. communication No. 441/1990, *Casanovas v. France*, at para. 5.1.

[18] See communication No. 998/2001, *Althammer v. Austria*, at para. 8.4.

[19] See para. 6.5 above.

U. Communication No. 1138/2002, *Arenz v. Germany* (Decision adopted on 24 March 2004, eightieth session)*

Submitted by:	Arenz, Paul; Röder, Thomas and Dagmar (represented by William C. Walsh)
Alleged victim:	The authors
State party:	Germany
Date of communication:	26 September 2002 (initial submission)

The Human Rights Committee, established under article 28 of the International Covenant on Civil and Political Rights,

Meeting on 24 March 2004,

Adopts the following:

Decision on admissibility

1. The authors of the communication are Paul Arenz (first author) and Thomas Röder (second author), as well as his wife Dagmar Röder (third author), all German citizens and members of the "Church of Scientology" (Scientology). They claim to be victims of violations by Germany[1] of articles 2, 18, 19, 22, 25, 26 and 27 of the International Covenant on Civil and Political Rights. They are represented by counsel. Mr. Arenz passed away in February 2004.

The facts as submitted by the authors

2.1 On 17 December 1991, the Christian Democratic Union (CDU), one of the two major political parties in Germany, adopted resolution C 47 at its National Party Convention, declaring that affiliation with Scientology is not "compatible with CDU membership". This resolution still continues to operate.

2.2 By letter of 22 September 1994, the chairman of the municipal branch of the CDU at Mechernich (Northrhine-Westphalia), with the subsequent support of the Federal Minister of Labour and regional party leader of the CDU in Northrhine-Westphalia, asked the first author, a long-standing CDU member, to terminate his membership in the CDU with immediate effect by signing a declaration of resignation, stating that he had learned of the first author's affiliation with Scientology. When the latter refused to sign the declaration, the Euskirchen CDU District Board decided, on 17 October 1994, to initiate exclusion proceedings against him, thereby stripping him of his rights as a party member until the delivery of a final decision by the CDU party courts.

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* The following members of the Committee participated in the examination of the present communication: Mr. Abdelfattah Amor, Mr. Nisuke Ando, Mr. Prafullachandra Natwarlal Bhagwati, Mr. Alfredo Castillero Hoyos, Ms. Christine Chanet, Mr. Franco Depasquale, Mr. Maurice Glèlè Ahanhanzo, Mr. Walter Kälin, Mr. Ahmed Tawfik Khalil, Mr. Rafael Rivas Posada, Sir Nigel Rodley, Mr. Martin Scheinin, Mr. Ivan Shearer, Mr. Hipólito Solari Yrigoyen, Ms. Ruth Wedgwood, Mr. Roman Wieruszewski and Mr. Maxwell Yalden.

2.3 By letter of 24 October 1994, the President of the Euskirchen District Party Court informed the first author that the Board had decided to expel him from the CDU because of his membership in the Scientology Church and that it had requested the District Party Court to take a decision to that effect after providing him with an opportunity to be heard. After a hearing was held on 2 December 1994, the District Party Court, on 6 December 1994, informed the first author that it had confirmed the decision of the District Board to expel him from the party. On 2 October 1995, the Northrhine-Westphalia CDU State Party Court dismissed the first author's appeal. His further appeal was rejected by the CDU Federal Party Court on 18 December 1996.

2.4 In separate proceedings, the second author, a long-standing member and later chairman of the Municipal Board of the CDU at Wetzlar-Mitte (Hessia), as well as the third author, who had also been a CDU member for many years, were expelled from the party by decision of 29 January 1992 of the CDU District Association of Lahn-Dill. This decision was preceded by a campaign against the second author's party membership, culminating in the organization of a public meeting attended by approximately 1,000 persons, in January 1992, during which the second author's reputation and professional integrity as a dentist were allegedly slandered because of his Scientology membership.

2.5 On 16 July 1994, the Middle Hessia District Party Court decided that the expulsion of the second and third authors from the party was in conformity with the relevant CDU statutes. The authors' appeals to the Hessia CDU State Party Court and to the Federal Party Court at Bonn were dismissed on 26 January 1996 and, respectively, on 24 September 1996.

3.1 On 9 July 1997, the Bonn Regional Court (*Landgericht Bonn*) dismissed the authors' legal action against the respective decisions of the CDU Federal Party Tribunal, holding that these decisions were based on an objective investigation of the facts, were provided by law, and complied with the procedural requirements set out in the CDU statutes. As to the substance of the complaint, the Court limited itself to a review of arbitrariness, owing to the fundamental principle of party autonomy set out in article 21, paragraph 1,[2] of the Basic Law.

3.2 The Court considered the decisions of the Federal Party Tribunal not to be arbitrary, given that the authors had acted in a manner contrary to resolution C 47, which spelled out a party principle of the CDU, within the meaning of article 10, paragraph 4,[3] of the Political Parties Act. The resolution itself was not arbitrary or inconsistent with the party's obligation to a democratic internal organization under article 21, paragraph 1, of the Basic Law, because numerous publications of Scientology and, in particular, its founder Ron Hubbard objectively indicated a conflict with the CDU's principles of free development of one's personality, tolerance and protection of the socially disadvantaged. This ideology could, moreover, be personally attributed to the authors, based on their self-identification with the organization's principles and their considerable financial contributions to it.

3.3 Although the CDU was bound to respect the authors' basic rights to freedom of expression and religious freedom, by virtue of its obligation to a democratic internal organization, the restriction of these rights was justified by the need to protect the autonomy and proper functioning of political parties, which by definition could not represent all political and ideological tendencies and were thus entitled to exclude opponents from within the party. Taking into account that the authors had considerably damaged the public image of the CDU and thereby decreased its electoral support at the local level, the Court considered that their expulsion was not disproportionate since it was the only means to restore party unity, the authors being at liberty to found a new party. Lastly, the Court considered that the authors could not invoke their rights under the European Convention on the Protection of Human Rights and Fundamental Freedoms or under the International Covenant on Civil and Political Rights vis-à-vis the CDU, which was not bound by these treaties as a private association.

3.4 By judgement of 10 February 1998, the Cologne Court of Appeals dismissed the authors' appeal, endorsing the reasoning of the Bonn Regional Court and reiterating that political parties, by virtue of article 21, paragraph 1, of the Basic Law, had to balance their right to party autonomy against the competing rights of party members. In addition, the Court found that political parties were entitled to adopt resolutions on the incompatibility of their membership with parallel membership in another organization, in order to distinguish themselves from competing parties or other associations pursuing opposite objectives, unless such decisions are arbitrary. However, Resolution C 47, as well as the decision of the Federal Party Tribunal that the teachings of Scientology were incompatible with basic CDU principles, was not considered arbitrary by the Court.

3.5 The Court emphasized that the authors had violated CDU principles, as defined in resolution C 47, not merely because of their convictions, but through the manifestation of these beliefs, as reflected by their membership in Scientology, their adherence to the organization's principles, the first author's achievement of the status "clear" within Scientology, and the second and third authors' substantial donations to the organization.

3.6 The authors' constitutional rights to protection of their dignity, free development of their personality, freedom of faith, conscience and creed, freedom of expression and freedom of association, read in conjunction with the constitutional principle of non-discrimination, as well as the requirement of a democratic internal organization within political parties, were superseded by the constitutionally protected interest of the party in its proper functioning and the principle of party autonomy. The authors' rights under the European Convention and the Covenant, both of which had been transformed into domestic law, could offer no higher level of protection.

3.7 In order to preserve its unity as well as its credibility, the CDU was entitled to expel the authors who had exercised their constitutional rights in a manner contrary to the party's principles and aims, thereby undermining its credibility and persuasiveness. The Court concluded that the authors had seriously impaired the public image of the CDU and that their expulsion was therefore covered by article 10, paragraph 4, of the Political Parties Act and was, moreover, proportionate to the aim pursued.

3.8 The authors' constitutional complaint was dismissed as manifestly ill-founded by the Federal Constitutional Court on 28 March 2002. The Court held that the lower courts were justified in limiting their review to the question of whether the authors' expulsion from the CDU was arbitrary or whether it violated their basic rights, as the autonomy of political parties required State courts to abstain from interpreting and applying party statutes or resolutions.

3.9 The Court was satisfied that the lower courts had struck an adequate balance between the constitutionally guaranteed autonomy of the CDU and the authors' constitutional rights. In particular, it observed that the authors' rights to freedom of opinion and to political participation had been lawfully restricted by resolution C 47, which implemented the statutory limitation contained in section 10, paragraph 4, of the Political Parties Act. Similarly, the lower courts' decision to give the higher priority to the autonomy of the CDU than to the authors' right to freedom of faith, conscience and creed was not considered arbitrary by the Court.

The complaint

4.1 The authors allege violations of their rights under articles 2, paragraph 1, 18, 19, 22, 25, 26 and 27 of the Covenant, as a result of their expulsion from the CDU, based on their affiliation with Scientology, and as a result of the German courts' decisions confirming these actions. In the authors' view, they were deprived of their right to take part in their communities' political affairs, as article 25 of the Covenant protected the right of "every citizen", meaning that "[n]o distinctions are permitted between citizens in the enjoyment of these rights on the grounds of race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status".[4] Their expulsion from the CDU amounted to an unreasonable restriction of that right, in the absence of any reference to a right of party autonomy in article 25.

4.2 The authors recall the Committee's interpretation that the right to freedom of association under article 22 of the Covenant is an essential adjunct to the rights protected under article 25, since political parties and membership in parties play a significant role in the conduct of public affairs and the election process. This right and the authors' right to freedom of expression under article 19, paragraph 2, of the Covenant had been arbitrarily restricted by their expulsion from the CDU, given that the Church of Scientology had not been banned by the Federal Constitutional Court, and that none of its organs was subject to criminal proceedings or had ever been convicted of any crime in Germany. Consequently, the authors' activities as Scientologists were entirely lawful and, in fact, compatible with CDU standards of conduct.

4.3 The authors submit that their exclusion from the CDU, upheld by the German courts, also violated their rights under article 18 of the Covenant, which had to be interpreted widely as encompassing freedom of thought on all matters, personal conviction and the commitment to religion or belief.[5] According to the Committee, the right to freedom of religion or belief was not limited to traditional religions, but also protected newly established and minority religions and beliefs. The authors outline the teachings of the founder of the Church of Scientology, Ron Hubbard, and argue that the CDU declaration form requiring them to publicly denounce their affiliation with Scientology in order not to be excluded from the party operated as a restriction, based on their religion or belief, on their right under article 25 to participate in public affairs and, as such, constituted coercion designed to compel them to recant their beliefs, in violation of article 18, paragraph 2, of the Covenant.

4.4 By way of analogy, the authors refer to the Committee's concluding observations on the fourth periodic report of Germany, where the Committee expressed its concern "that membership in certain religious sects as such may in some Länder of the State party disqualify individuals from obtaining employment in the public service, which may in certain circumstances violate the rights guaranteed in articles 18 and 25 of the Covenant".[6]

4.5 The authors contend that their expulsion from the CDU amounts to discrimination, within the meaning of articles 2, paragraph 1, and 26 of the Covenant, since no other religious group had been singled out for exclusion. Moreover, they submit that in a 1992 position paper justifying the adoption of resolution C 47, the CDU blatantly mischaracterized the Church of Scientology as being opposed to democracy and social outreach programmes, while in reality Scientology promoted such values.

4.6 The authors claim that their exclusion from the CDU caused them serious personal and economic injury. Thus, in the first author's case, the District Administration of Euskirchen had denied him a business license on the ground that he was a Scientologist and therefore "unreliable", whereas his bank had cancelled his business account without stating any reasons. As a consequence of the damage caused to his business, he had to sell his company to his son who was not affiliated to Scientology. In the case of the second author, the public campaign against him had severely injured his private dental practice, which had moreover been "S-marked" by the Federal Labour Office, thereby falsely identifying it as a "Scientology company".

4.7 The authors claim that they have exhausted all available domestic remedies and that the same matter is not being and has not been examined under another procedure of international investigation or settlement.

The State party's observations on the admissibility of the communication

5.1 By note verbale of 21 January 2003, the State party challenged the admissibility of the communication, arguing that it is inadmissible *ratione temporis*, on the basis of the German reservation concerning article 5, paragraph 2 (a), of the Optional Protocol, since the alleged violations of the authors' rights had their origin in events occurring prior to the entry into force of the Optional Protocol for the Federal Republic of Germany on 25 November 1993.

5.2 Although the decisions of the District Party Courts confirming the authors' expulsion from the CDU dated from July and, respectively, December 1994, these decisions were based on resolution C 47, which had been adopted by the National Party Convention on 17 December 1991. The State party argues that, pursuant to its reservation, the decisive point of time for determining the applicability of the Optional Protocol was not the alleged violation as such but rather its origin "within the meaning of material or perhaps also indirect cause(s)". This could be seen when comparing the German reservation with the different wording of reservations entered by other States parties to the Optional Protocol such as France, Malta and Slovenia, which explicitly referred to violations resulting from acts, omissions, developments or events which occurred after the entry into force of the Optional Protocol for these States or from related decisions. Furthermore, the authors' claims essentially focused on resolution C 47, in the absence of any additional objections regarding the individual decisions on their exclusion from the CDU, which merely implemented that resolution.

5.3 The State party submits that the communication is also inadmissible *ratione personae* under article 1 of the Optional Protocol, since it failed to address violations by a State party, and argues that it cannot be held responsible for expulsions of members from political parties, as these were freely organized associations under private law. By reference to the jurisprudence of the former European Commission of Human Rights,[7] the State party submits that the only exception to this caveat would consist in a violation of its obligation to protect the authors' rights under the Covenant against unlawful interference by a third party. However, the authors had failed to substantiate such a violation. In particular, the State party argues that it had complied with its obligation under article 25 to protect the authors' right to take part in the conduct of public affairs, through the enactment of article 10, paragraph 4, of the Political Parties Act, which significantly restricted the autonomy of political parties to expel members. The authors' rights under article 25 had not been unduly restricted by their expulsion from the CDU, taking into account the German courts' examination of whether the requirements set out in article 10, paragraph 4, of the Political Parties Act, had been met, as well as the authors' freedom to found a new party.

5.4 Lastly, the State party submits that the authors' claim under article 18 of the Covenant is inadmissible *ratione materiae*, because the "Scientology Organi[z]ation" cannot be considered a religious or a philosophical community, but an organization aimed at economic gains and acquisition of power.

The authors' comments on the State party's admissibility observations

6.1 On 7 April 2003, the authors responded to the State party's submissions on admissibility, submitting that the communication is admissible *ratione temporis*, *ratione personae* and *ratione materiae*. They argue that their claims relate to events which occurred after the entry into force of the Optional Protocol for the State party in 1993, namely their expulsion from the CDU, rather than to the adoption in 1991 of resolution C 47, which had not been applied to initiate exclusion proceedings against them until 1994. Subsidiarily, and by reference to the Committee's jurisprudence, the authors claim that, in any event, the adoption of that resolution had continued effects, resulting in their expulsion from the CDU in 1994.

6.2 The authors submit that the alleged violations are attributable to the State party, because the State party (1) had failed to comply with its obligation to ensure and to protect the authors' rights under the Covenant; (2) had interfered with those rights through official statements and actions encouraging, directly or indirectly, the authors' expulsion from the CDU; and (3) was responsible for the failure of the German courts properly to interpret the extent of the authors' rights, as well as the State party's corresponding obligations, under the Covenant.

6.3 In particular, the authors argue that the State party's violation of its duty to protect their Covenant rights by failing to take any effective measures to prevent their exclusion from the CDU constitutes an omission attributable to the State party. In accordance with the Committee's interpretation of article 25 of the Covenant, the State party was under a duty to take positive steps to ensure that the CDU, in its internal management, respects the free exercise by the authors of their rights under the applicable provisions of article 25. Similarly, under articles 18, 19 and 22, the State party was required to adopt positive and effective measures to protect the authors against discrimination by private persons or organizations such as the CDU, either because of the close link between those rights and the right under article 25 to take part in the conduct of public affairs, or based on the general applicability of the principle of non-discrimination contained in articles 2, paragraph 1, and 26 of the Covenant. The authors conclude that, despite the State party's broad discretion regarding the implementation of these obligations, the adoption of general legislation in form of the Political Parties Act, which failed to prohibit discrimination based on religion or belief, falls short of meeting these obligations.

6.4 In addition, the authors argue that the State party has supported and encouraged the adoption by the CDU of resolution C 47 through numerous statements and actions which were allegedly biased against Scientology, such as a letter by the Federal Minister of Labour supporting the first author's exclusion from the CDU, or by false statements and official publications regarding the Church of Scientology.

6.5 In the authors' view, the limited review by the German courts of the decisions of the CDU party courts failed to ensure respect for the authors' rights under the Covenant. Thus, it was obvious that, while manifestations of religion or beliefs, as well as the exercise of the right to freedom of expression, may be subject to limitations, the "core" right to hold beliefs or opinions was protected unconditionally and may not be restricted. Since the CDU, throughout the domestic proceedings, presented no evidence to the effect that the authors had made any statements or had engaged in any activities in violation of the law or the party's standards of conduct, the German courts had failed to apply these principles, thereby triggering the State party's responsibility under the Covenant, which applied to all State organs including the judiciary.

6.6 The authors stress the need to distinguish their case from the decision of the European Commission of Human Rights in *Church of Scientology v. Germany* (Application No. 34614/97), where the applicant had failed to exhaust domestic remedies and to demonstrate that it had received specific instructions from its members to act on their behalf. While conceding that the Commission found that it could not entertain claims regarding violations by private persons, including political parties, they emphasize that the application did not involve any decisions rendered in domestic proceedings and that certain rights, in particular the right to take part in public affairs, were not protected under the European Convention for the Protection of Human Rights and Fundamental Freedoms.

6.7 The authors dismiss the State party's argument that they could found a new party, stating that in most cases of discrimination a similar solution can be proposed by the State, e.g. the foundation of an own company or of a private school in cases of termination of employment or, respectively, of non-admission to a school based on prohibited grounds of discrimination. However, what the authors were seeking was not to engage in another party representing their personal and, indeed, apolitical beliefs, but to enjoy their right to join and participate in the political party of their choice on an equal footing with any other German citizen.

6.8 Lastly, the authors reiterate that, according to the Committee, article 18 of the Covenant also applies to newly established religious groups and to minority religions which may be the subject of hostility by a predominant religious community. Moreover, the European Commission of Human Rights had recognized the Church of Scientology as a religious community entitled to raise claims under article 9, paragraph 1, of the European Convention in its own capacity and as a representative of its members. In addition, Scientology was officially recognized as a religion in several countries[8] and as a religious or philosophical community in numerous judicial and administrative decisions including decisions by German courts. Similarly, the Federal Constitutional Court had held that the authors' exclusion from the CDU was compatible with article 4, paragraph 1,[9] of the Basic Law: "This holds true also when in favour of the plaintiffs it is assumed that the Church of Scientology is, in any event, a philosophical community (*Weltanschauungsgemeinschaft*) [...]."

7. On 15 March 2004, counsel informed the Committee that the first author, Mr. Paul Arenz, had died on 11 February 2004. However, it was his explicit will that his communication be pursued after his death. Counsel submits a document signed by the heirs authorizing him "to continue the representation of the pending communication on behalf of our late husband and father Mr. Paul Arenz with our knowledge and consent before the United Nations Human Rights Committee". In addition to the explicit intent of the deceased, his heirs declare their own interest in seeking rehabilitation and just satisfaction, since the entire family had to suffer from the climate of suspicion and intolerance among the population of their village resulting from the first author's expulsion from the CDU. By reference to the Committee's Views in *Henry and Douglas v. Jamaica*,[10] counsel further submits that his original, broad authorization to act on behalf of the first author gives him standing to continue his representation in the present proceedings.

Issues and proceedings before the Committee

8.1 Before considering any claim contained in a communication, the Human Rights Committee must, in accordance with rule 87 of its rules of procedure, decide whether or not the communication is admissible under the Optional Protocol to the Covenant.

8.2 The Committee has noted the author's allegations, as well as the State party's challenge to the admissibility of the communication, namely that the events complained of by the authors had their origin in the adoption by the CDU National Party Convention of resolution C 47 on 17 December 1991, prior to the entry into force of the Optional Protocol for Germany on 25 November 1993, and that the Committee's competence to examine the communication was therefore precluded by virtue of the German reservation to article 5, paragraph 2 (a), of the Optional Protocol.

8.3 The Committee observes that the authors had not been personally and directly affected by resolution C 47 until that resolution was applied to them individually through the decisions to expel them from the party in 1994. The origin of the violations claimed by the authors cannot, in the Committee's view, be found in the adoption of a resolution generally declaring CDU membership incompatible with affiliation with Scientology, but must be linked to the concrete acts which allegedly infringed the authors' rights under the Covenant. The Committee therefore concludes that the State party's reservation does not apply, as the alleged violations had their origin in events occurring after the entry into force of the Optional Protocol for Germany.

8.4 The Committee notes that the heirs of Mr. Arenz have reaffirmed their interest in seeking rehabilitation and just satisfaction for the late first author as well as for themselves, and concludes that they have *locus standi*, under article 1 of the Optional Protocol, to proceed with the first author's communication.

8.5 With regard to the State party's argument that it cannot be held responsible for the authors' exclusion from the CDU, this being the decision not of one of its organs but of a private association, the Committee recalls that under article 2, paragraph 1, of the Covenant, the

State party is under an obligation not only to respect but also to ensure to all individuals within its territory and subject to its jurisdiction all the rights recognized in the Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. Where, as in the present case, the domestic law regulates political parties, such law must be applied without consideration. Furthermore, States parties are thus under an obligation to protect the practices of all religions or beliefs from infringement[11] and to ensure that political parties, in their internal management, respect the applicable provisions of article 25 of the Covenant.[12]

8.6 The Committee notes that although the authors have made some references to the hardship they have more generally experienced due to their membership in the Church of Scientology, and to the responsibility of the State party to ensure their rights under the Covenant, their actual claims before the Committee merely relate to their exclusion from the CDU, an issue in respect of which they also have exhausted domestic remedies in the meaning of article 5, paragraph 2 (b), of the Optional Protocol. Consequently, the Committee need not address the broader issue of what legislative and administrative measures a State party must take in order to secure that all citizens may meaningfully exercise their right of political participation under article 25 of the Covenant. The issue before the Committee is whether the State party violated the authors' rights under the Covenant in that its courts gave priority to the principle of party autonomy, over their wish to be members in a political party that did not accept them due to their membership in another organization of ideological nature. The Committee recalls its constant jurisprudence that it is not a fourth instance competent to re-evaluate findings of fact or re-evaluate the application of domestic legislation, unless it can be ascertained that the proceedings before the domestic courts were arbitrary or amounted to a denial of justice. The Committee considers that the authors have failed to substantiate, for purposes of admissibility, that the conduct of the courts of the State party would have amounted to arbitrariness or a denial of justice. Therefore, the communication is inadmissible under article 2 of the Optional Protocol.

9. The Human Rights Committee therefore decides:

(a) That the communication is inadmissible under article 2 of the Optional Protocol;

(b) That this decision shall be communicated to the State party and to the authors.

[Adopted in English, French and Spanish, the English text being the original version. Subsequently to be issued also in Arabic, Chinese and Russian as part of the present report.]

Notes

[1] The Covenant and the Optional Protocol to the Covenant entered into force for the State party on 23 March 1976 and 25 November 1993 respectively. Upon ratification of the Optional Protocol, the State party entered the following reservation: "The Federal Republic of Germany formulates a reservation concerning article 5 paragraph 2 (a) to the effect that the competence of the Committee shall not apply to communications:

(a) Which have already been considered under another procedure of international investigation or settlement; or

(b) By means of which a violation of rights is reprimanded having its origin in events occurring prior to the entry into force of the Optional Protocol for the Federal Republic of Germany;

(c) By means of which a violation of article 26 of the [said Covenant] is reprimanded, if and insofar as the reprimanded violation refers to rights other than those guaranteed under the aforementioned Covenant."

[2] Article 21, paragraph 1, of the Basic Law reads: "Political parties shall participate in the formation of the political will of the people. They may be freely established. Their internal organization must conform to democratic principles. They must publicly account for their assets and for the sources and use of their funds."

[3] Article 10, paragraphs 4 and 5, of the Political Parties Act read: "(4) A member may only be expelled from the party if he or she deliberately infringes the statutes or acts in a manner contrary to the principles or discipline of the party and thus seriously impairs its standing.
(5) The arbitration court competent in accordance with the Code on Arbitration Procedure shall decide on expulsion from the party. The right to appeal to a higher court shall be granted. Reasons for the decisions shall be given in writing. In urgent and serious cases requiring immediate action, the executive committee of the party or a regional association may exclude a member from exercising his rights pending the arbitration court's decision."

[4] The authors quote the Committee's general comment 25, at para. 3.

[5] The authors refer to the Committee's general comment 22, at para. 1.

[6] Concluding Observations on the fourth report of Germany, UN Doc. CCPR/C/79/Add.73, at para. 16.

[7] See European Commission of Human Rights, application No. 34614/1997, *Church of Scientology v. Germany*, decision of 7 April 1997.

[8] Australia, New Zealand, South Africa, Sweden, Taiwan and the United States of America.

[9] Article 4, paragraph 1, of the Basic Law reads: "Freedom of faith and of conscience, and freedom to profess a religious or philosophical creed, shall be inviolable."

[10] See communication No. 571/1994, *Henry and Douglas v. Jamaica*, Views adopted on 25 July 1996, para. 6.2.

[11] Cf. CCPR, forty-eighth session (1993), general comment No. 22, at para. 9.

[12] See CCPR, fifty-seventh session (1996), general comment No. 25, at para. 26.

V. Communication No. 1179/2003, *Ngambi v. France* (Decision adopted on 9 July 2004, eighty-first session)*

Submitted by:	Benjamin Ngambi and Marie-Louise Nébol (not represented by counsel)
Alleged victim:	The authors
State party:	France
Date of communication:	18 February 2003 (initial submission)

The Human Rights Committee, established under article 28 of the International Covenant on Civil and Political Rights,

Meeting on 9 July 2004,

Adopts the following:

Decision on admissibility

1.1 The authors are Mr. Benjamin Ngambi, of Cameroonian origin and with refugee status in France, and Ms. Marie-Louise Nébol, of Cameroonian nationality and resident in Douala, Cameroon. They claim to be victims of violations by France of articles 17 and 23 of the International Covenant on Civil and Political Rights. They are not represented by counsel.

1.2 On 15 October 2003 the Committee, acting through its Special Rapporteur on new communications, decided to separate consideration of the admissibility and merits of the communication.

The facts as submitted

2.1 Mr. B. Ngambi states that he married Ms. M.-L. Nébol in Cameroon on 15 January 1983. After engaging in political activity, he was arrested by the police on two occasions and fled Cameroon in 1993. He submitted an application for refugee status in France in 1994.

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* The following members of the Committee participated in the examination of the present communication: Mr. Abdelfattah Amor, Mr. Prafullachandra Natwarlal Bhagwati, Mr. Franco Depasquale, Mr. Maurice Glèlè Ahanhanzo, Mr. Walter Kälin, Mr. Ahmed Tawfik Khalil, Mr. Rajsoomer Lallah, Mr. Rafael Rivas Posada, Sir Nigel Rodley, Mr. Martin Scheinin, Mr. Ivan Shearer, Mr. Hipólito Solari Yrigoyen, Ms. Ruth Wedgwood and Mr. Roman Wieruszewski.

Pursuant to rule 84, 1 (a) of the Committee's rules of procedure, Ms. Christine Chanet did not participate in adoption of the decision.

2.2 On 8 March 1995, the French authorities accorded refugee status to Mr. B. Ngambi and, on 16 May 1995, issued a record of civil status acknowledging his marriage to Ms. M.-L. Nébol.

2.3 Nevertheless, in a decision dated 19 September 1999, the Consul General of France in Douala, Cameroon, denied the application for a visa for Ms. M.-L. Nébol on the ground of family reunification, as the Cameroonian authorities had indicated that the authors' marriage certificate was not genuine. The decision states that the denial did not constitute a disproportionate interference with the right to privacy and to a family life owing to the circumstances indicated above, and to the fact that in practice Ms. M.-L. Nébol and Mr. B. Ngambi had no conjugal life together; the latter had in fact had a relationship with Ms. M.K., with whom he had had a child.

2.4 On 23 May 2001, in a ruling on Ms. M.-L. Nébol's appeal against the decision by the Consul General of France, the Council of State found that the fact that the marriage certificate submitted by the authors was not genuine, and that this circumstance became known subsequent to recognition by the French authorities of the authors' marriage certificate, constituted legal justification for the denial of a visa for Ms. M.-L. Nébol. The Council concluded that, since the authors did not cohabit as spouses, the decision of 19 September 1999 was not a disproportionate interference with the right of the party to respect for private and family life, as guaranteed by article 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms.

The complaint

3.1 The authors assert that the decision by the Council of State constitutes a serious infringement of their right to a private and family life, in violation of articles 17 and 23, paragraphs 1 and 3 of the Covenant. They claim that the State party has interfered in their private and romantic life by enquiring into Mr. B. Ngambi's extramarital relationship and by informing Ms. M.-L. Nébol of them.

3.2 The authors further maintain that the French authorities have attempted to compel Mr. B. Ngambi to marry Ms. M.K., in violation of article 23, paragraph 2 of the Covenant.

3.3 The authors state that they have exhausted domestic remedies and that the same matter is not being examined under another procedure of international investigation or settlement.

Observations by the State party

4.1 In its observations of 24 July 2003 the State party contests the admissibility of the communication.

4.2 Firstly, the State party offers the following clarifications as to the facts.
On 7 March 1994, Mr. B. Ngambi applied for refugee status in France. On 19 December 1994, his application was denied by the French Office for the Protection of Refugees and Stateless Persons (OFPRA). Ruling on the author's appeal on 8 March 1995, the Refugee Appeals Commission accorded him refugee status.

4.3 On 23 August 1995, OFPRA, relying on declarations by Mr. B. Ngambi which later proved false, recorded the marriage of Mr. B. Ngambi with Ms. M.-L. Nébol and issued a marriage certificate and a family civil status record.

4.4 On 13 November 1996, Adeline, the child of Mr. B. Ngambi and Ms. M.K., was born in France.

4.5 On 7 January 1998, Ms. M.-L. Nébol, claiming to be Mr. B. Ngambi's wife, applied for a long-stay visa for entry into France.

4.6 On 2 March 1998, the Ministry of Foreign Affairs informed Mr. B. Ngambi that his "union with Ms. M.K." had had the effect of ending his conjugal life with Ms. M.-L. Nébol. Under these circumstances the "family reunification procedure was no longer applicable".

4.7 On 20 March 1998, Mr. B. Ngambi applied to the Paris Administrative Court for annulment of the decision of 2 March 1998.

4.8 On 30 March 1998, the mayor of Douala, Cameroon, wrote to the Consul General of France in Douala, stating that marriage certificate No. 117/83 (the number on the marriage certificate supplied by the authors in connection with their application for family reunification) related, in reality, to the marriage of Mr. François Yonkeu and Ms. Marceline Yakam. Accordingly, the marriage certificate supplied by the authors was not genuine.

4.9 On 3 April 1998, the Consul General of France transmitted this correspondence to OFPRA. On 11 May 1998, the Consulate also informed OFPRA that the birth certificates of Ms. M.-L. Nébol and the authors' two claimed sons, Frank Ngambi and Emmanuel Ngambi, were not genuine and confirmed that the authors' marriage certificate was not genuine.

4.10 On 4 June 1999, the Paris Administrative Court annulled the decision by the Ministry of Foreign Affairs of 2 March 1998 as ultra vires.

4.11 On 19 September 1999, the Consul General denied Ms. M.-L. Nébol's visa application. On 7 October 1999, Mr. B. Ngambi submitted an application to the Paris Administrative Court for execution of the judgement of 4 June 1999 of the same court. On 18 November 1999, Ms. M.-L. Nébol submitted an application to the Council of State for rescission of the denial of a visa on 19 September 1999.

4.12 On 23 May 2001, the Council of State rejected the application by Ms. M.-L. Nébol. The Council considered that, in taking his decision, the Consul General of France in Douala had relied, in part, on the documents produced by Douala municipality, on the fact that the certificate produced by Ms. M.-L. Nébol attesting to her marriage with Mr. B. Ngambi was not genuine, and, in part, on the absence of conjugal life by the authors.

4.13 Lastly, with a view to assisting the Committee in forming its views on Mr. B. Ngambi and his family relationships, the State party thought it relevant to provide the following information.

4.14 By an order of 17 January 2000, the Paris District Court withdrew Ms. Sophie Ngambi Enono from the guardianship of Mr. B. Ngambi, her guardian. The order states that "Sophie Ngambi Enono, born on 17 February 1970 at Bertoua, Cameroon (…) is severely handicapped as the result of a trisomy, and is completely dependent; she is confined by her guardian to a study bedroom (…) where she is left alone and fed, at best, once a day." The court ordered Mr. B. Ngambi to provide an accounting to the new legal representative, and in particular that "Benjamin Ngambi must provide a full account of the disposition of the amount of 35,193 French francs received on 16 September 1999 by Sophie Ngambi Enono as disability benefit arrears."

4.15 Further, the Paris police chief, in transmitting to the Director of OFPRA on 23 May 2000 the order by the Paris District Court, stated that: "I wish to draw your attention in connection with acts by Mr. Ngambi to the fact that he appears to be responsible for the arrival in France of several asylum-seekers as well as of several children of Cameroonian nationality who entered France on false passports from the Central African Republic and in respect of whom he produced a guardianship order from the Douala District Court (…)."

4.16 Secondly, the State party asserts that the allegations of violations of articles 23 and 17 of the Covenant are inadmissible. In the first place the State party contends that the communication by the authors is incompatible *ratione materiae* with the provisions of article 23 of the Covenant.

4.17 The State party recalls that it has not been established that the authors are married. In any event they have not provided any evidence to this effect. On the contrary, as certified by Douala municipality in its letter of 30 March 1998, the marriage certificate supplied to the French authorities by the authors was not genuine.

4.18 Furthermore, Mr. B. Ngambi left Cameroon in May 1993, according to information that he provided to the Refugee Appeals Commission, and has been living in France at least since 17 February 1994, the date on which a residence permit was issued at Bobigny, France. Accordingly, Mr. B. Ngambi cannot claim that he maintains a conjugal life with Ms. M.-L. Nébol, who lives in Cameroon. Lastly, Mr. B. Ngambi has been cohabiting with Ms. M.K. with whom he had a child, Adeline, born on 13 November 1996.

4.19 Thus, according to the State party, the authors do not constitute a "family" within the meaning of article 23 of the Covenant and thus cannot invoke protection by society and the State (art. 23, para. 1), which is not applicable in their case.

4.20 The State party also maintains that article 23, paragraphs 2 and 3, also fail to apply to the situation of the authors. In fact their "right to marry and to found a family" has never been contested. Contrary to the assertions by the authors, the French authorities have not put any pressure either on the authors, or on Ms. M.K., to induce the latter to marry Mr. B. Ngambi. According to the State party these are mere assertions by the authors, who have provided no documentary evidence to substantiate their complaint. Further, for article 23, paragraphs 2 and 3, to be applicable in this case, the authors would need to establish that they had been frustrated in their plans to marry, either because they had been prevented from doing so, or, on the contrary, because they had been forced to do so. The State party concludes that no such factor is present in this case. In actuality the French authorities have contested the reality of their marriage, and not their desire to marry.

4.21 Lastly, the State party considers that article 23, paragraph 4, is inapplicable, since it relates to "spouses", whereas the authors have not proved that they were married.

4.22 Secondarily, the State party asserts that the authors are not victims of violations of article 23, on the grounds stated above.

4.23 The State party then explains that the allegation of a violation of article 17 of the Covenant is inadmissible in that the authors are not in fact victims. The State party recalls that Ms. M.-L. Nébol made an application for a long-stay visa for entry into France on the ground of family reunification. In consequence, according to the State party, it was completely logical for the French authorities to verify that the application had indeed been made by the wife of Mr. Ngambi. The checks carried out by the French authorities were further to the application by Ms. M.-L. Nébol. It was thus the visa application that led to the so-called "interference" by the French authorities in her private and family life. In the circumstances, according to the State party, the involvement by the French authorities, which was a natural consequence of the application for family reunification made by the authors, cannot have resulted in the slightest injury to them. They themselves sought this involvement with a view to obtaining a visa for Ms. M.-L. Nébol.

Comments by the authors on the observations by the State party

5.1 In their comments of 17 November 2003 the authors maintain that their communication is admissible.

5.2 With regard to article 23 of the Covenant, the authors reiterate that their marriage certificate No. 117/83, issued and authenticated by Douala municipality on 7 October 1997, was recognized as such in a letter from the Ministry of Foreign Affairs dated 30 December 1997, as well as by OFPRA; it thus cannot be questioned, and cannot justify the denial of a long-stay visa for Ms. Nébol.

5.3 As for their status as victims, the authors emphasize that their lack of a conjugal life is the result of the refusal of the consular authorities to allow them to be together in France.

5.4 With regard to article 17 of the Covenant, the authors are of the view that the authorities subsequently wrongly considered that their marriage certificate was a forgery; they take the view that denial of the visa for Ms. Nébol was an attempt to undermine their marriage. With regard to Mr. Ngambi's liaison with Ms. M.K., the author states that "this was a short-lived liaison, reflecting the lifestyle led in France", falling strictly within his private life, and that as such it should not be confused with polygamy and should not affect his application for family reunification. Lastly, the authors maintain that the attitude of the French authorities amounts to pressure on and intimidation of them.

5.5 Regarding the subsidiary information provided by the State party concerning its rescission of guardianship over his cousin Ms. Sophie Ngambi Enono, the author asserts that this is exaggerated, and claims that the case indicates persecution of himself by the judicial authorities.

Issues and proceedings before the Committee

6.1 Before considering any claim contained in a communication, the Human Rights Committee must, in accordance with rule 87 of its rules of procedure, decide whether or not the communication is admissible under the Optional Protocol to the Covenant.

6.2 As it is bound to do under article 5, paragraph 2 (a), of the Optional Protocol, the Committee has ascertained that the same matter is not being examined under another procedure of international investigation or settlement.

6.3 With regard to the claimed violation of article 23 of the Covenant, the Committee has noted the arguments of the authors and of the State party. Although the authenticity of the authors' "marriage certificate" was not at first questioned either by OFPRA or by the Ministry of Foreign Affairs in a letter dated 30 December 1997, nonetheless, marriage certificate No. 117/83 of 15 January 1983 purporting to be from the municipality of Douala was determined by the municipality on 30 March 1998 to be inauthentic and this report was invoked by the Consul General of France in Douala on 19 September 1999 as a ground for denial of Ms. Nébol's visa application. In addition, the birth certificates supplied by Ms. Nébol to authenticate the family relation of the authors' two claimed sons, Franck Ngambi and Emmanuel Ngambi, as well as her own birth certificate, were also determined by the Consul General to be inauthentic.

6.4 Article 23 of the Covenant guarantees the protection of family life including the interest in family reunification. The Committee recalls that the term "family", for purposes of the Covenant, must be understood broadly as to include all those comprising a family as understood in the society concerned. The protection of such family is not necessarily obviated, in any particular case, by the absence of formal marriage bonds, especially where there is a local practice of customary or common law marriage. Nor is the right to protection of family life necessarily displaced by geographical separation, infidelity, or the absence of conjugal relations. However, there must first be a family bond to protect. The Committee notes that the authors submitted to the French authorities documents supposedly attesting to the family relationship, but these documents were determined by the French authorities to be fabricated. The Committee further notes that the authors have not effectively refuted these findings, thus giving the French authorities sufficient basis to deny the authors' applications for a long-term visa and family reunification. The Committee considers that the authors have not substantiated their allegation that the right to protection of family life has been infringed by the French authorities.

6.5 With regard to the alleged violation of article 17 of the Covenant, that is, interference with private and family life, the Committee notes that the inquiries conducted by the French authorities as to Ms. Nébol's status and family relations followed upon her request for a visa for family reunification, and necessarily had to cover considerations relating to the private and family life of the authors. The Committee considers that the authors have not demonstrated that these inquiries amounted to arbitrary and illegal interference in their private and family life. Nor have the authors substantiated their allegations of pressure and intimidation on the part of the French authorities aimed at undermining their so-called marriage.

7.1 Accordingly, the Committee finds the complaints inadmissible under article 2 of the Optional Protocol.

7.2 The Committee therefore decides:

(a) That the communication is inadmissible under article 2 of the Optional Protocol;

(b) That this decision shall be communicated to the State party and to the author.

[Adopted in English, French and Spanish, the French text being the original version. Subsequently to be issued also in Arabic, Chinese and Russian as part of the present report.]

W. Communication No. 1191/2003, *Hruska v. The Czech Republic* (Decision adopted on 30 October 2003, seventy-ninth session)*

Submitted by:	Ms. Elizabeth Hruska (Not represented by counsel)
Alleged victim:	The author
State party:	Czech Republic
Date of communication:	31 March 2003 (initial submission)

The Human Rights Committee, established under article 28 of the International Covenant on Civil and Political Rights,

Meeting on 30 October 2003

Adopts the following:

Decision on admissibility

1. The author of the communication is Elizabeth Hruska. She claims to be a victim of a violation by the Czech Republic of her rights under articles 2, 5, 18, 19 and 26 of the Covenant.[1] The author is not represented by counsel.

The facts as presented

2.1 On 3 March 2001, the State Social Security Administration, Prague Office (Ceska sprava socialniho zabezpeceni Praha) issued a decision regarding the calculation of the author's disability benefits.

2.2 On 13 April 2001, the author appealed this decision in the Regional Court at Brno requesting a review of the decision to the effect that it include an additional insurance period for purposes of calculating her disability benefits. The Regional Court at Brno, by judgement of 12 September 2002, upheld the decision of the Social Security Administration, considering the author's claim to be unreasonable.

2.3 The author appealed to the High Court at Olomouc on 24 October 2002, claiming that the decision of the Regional Court violated the ICCPR, the International Covenant on Economic, Social and Cultural Rights, and article 95, paragraph 1, of the Czech Constitution.

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* The following members of the Committee participated in the examination of the present communication: Mr. Abdelfattah Amor, Mr. Nisuke Ando, Mr. Prafullachandra Natwarlal Bhagwati, Mr. Alfredo Castillero Hoyos, Ms. Christine Chanet, Mr. Franco Depasquale, Mr. Maurice Glèlè Ahanhanzo, Mr. Walter Kälin, Mr. Ahmed Tawfik Khalil, Mr. Rajsoomer Lallah, Mr. Rafael Rivas Posada, Sir Nigel Rodley, Mr. Martin Scheinin, Mr. Hipólito Solari Yrigoyen, Ms. Ruth Wedgwood, Mr. Roman Wieruszewski and Mr. Maxwell Yalden.

2.4 On 16 December 2002, the High Court halted the proceedings and informed the author that as a consequence of an amendment of the law and the resulting expiry of the Court's jurisdiction in the matter, the author would need to submit her appeal to the Supreme Administrative Court. The author was also informed that complainants before the Supreme Administrative Court are required to have a representative who is a lawyer or has at least higher legal education.

The complaint

3.1 The author claims a violation of articles 2, 5, 18, 19 and 26 of the Covenant, in that she is discriminated against on the basis of her lack of education in a Czech law school; she has no remedy against arbitrary decisions of the lower courts; she does not have the right to think on legal issues or develop her own legal ideas, conclusions or objections; she is denied the right to hold opinions without interference on any legal issue and the right to express her opinion in any court before any judge; and in that she does not have any law school education but wishes to act on her own behalf in civil cases.

Issues and proceedings before the Committee

4.1 Before considering any claim contained in a communication, the Human Rights Committee must, in accordance with rule 87 in its rules of procedure, decide whether or not the communication is admissible under the Optional Protocol to the Covenant.

4.2 The Committee recalls its jurisprudence to the effect that it does not consider that the requirement of legal representation before the highest national judicial instance is not based on objective and reasonable criteria.[2] The author has not advanced any arguments in support of her claim, beyond the mere assertion that this requirement was discriminatory. The Committee accordingly considers that she has not substantiated her claim, for purposes of admissibility.

5. Accordingly, the Committee decides:

(a) That the communication is inadmissible under article 2 of the Optional Protocol;

(b) That the decision will be transmitted to the author and, for information, to the State party.

[Adopted in English, French and Spanish, the English text being the original version. Subsequently to be issued also in Arabic, Chinese and Russian as part of the present report.]

Notes

[1] The Covenant and the Optional Protocol entered into force in respect of Czechoslovakia on 23 March 1976 and 12 June 1991, respectively. On 22 February 1993 the Czech Republic deposited an instrument of succession, related to both treaties.

[2] See decision on case No. 866/1999, decision of 31 August 2001, *Marina Torregrosa Lafuente et al. v. Spain*, para. 6.3.

X. Communication No. 1214/2003, *Vlad v. Germany* (Decision adopted on 1 April 2004, eightieth session)*

Submitted by:	Adrian Vlad (not represented by counsel)
Alleged victim:	The author
State party:	Germany
Date of communication:	3 June 2003 (initial submission)

The Human Rights Committee, established under article 28 of the International Covenant on Civil and Political Rights,

Meeting on 1 April 2004,

Adopts the following:

Decision on admissibility

1. The author of the communication, dated 3 and 10 June and 22 July 2003, is Mr. Adrian Vlad, a German national, born on 28 October 1962 in Craiova/Romania. He claims that he and his family are victims of violations by Germany[1] of articles 2, paragraphs 1 and 3, 14, paragraph 1, 16, 17, 23, paragraph 1, and 26 of the Covenant. He is not represented by counsel.

The facts as submitted by the author

2.1 From 1995 until 2001, the author rented an apartment from the construction company GBO in Offenbach. In 1998, he discontinued payments for charges additional to rent, claiming a right to withhold payments (*Zurückbehaltungsrecht*), on the basis that the GBO had failed to comply with its obligation to grant him access to the receipts upon which the additional charges for running costs had been calculated. On 6 September 1999, when overdue charges ran to DM 3,364.52, the GBO unilaterally terminated the tenancy and brought a court action for eviction and payment of the arrears against the author and his wife, Kerstin Vlad.

2.2 By judgements of 9 May 2000, the District Court of Offenbach ordered the author and his wife to quit the apartment and to pay the overdue charges, with costs. Their appeals to the Regional Court of Darmstadt were dismissed on 14 December 2000, with costs. No constitutional complaint was lodged against the dismissals within the one-month period following the delivery of the judgements on 3 January 2001.

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* The following members of the Committee participated in the examination of the present communication: Mr. Nisuke Ando, Mr. Prafullachandra Natwarlal Bhagwati, Mr. Alfredo Castillero Hoyos, Ms. Christine Chanet, Mr. Franco Depasquale, Mr. Maurice Glèlè Ahanhanzo, Mr. Ahmed Tawfik Khalil, Mr. Rafael Rivas Posada, Sir Nigel Rodley, Mr. Martin Scheinin, Mr. Ivan Shearer, Mr. Hipólito Solari Yrigoyen, Mr. Roman Wieruszewski and Mr. Maxwell Yalden.

2.3 On 7 January 2001, the author brought criminal charges against the sitting judges of the District Court of Offenbach as well as the Regional Court of Darmstadt, alleging that their failure to interpret and apply the relevant laws and regulations on rent control in conformity with the jurisprudence of the Federal Court of Justice (*Bundesgerichtshof*) and the Federal Constitutional Court (*Bundesverfassungsgericht*) amounted to "perversion of justice", and threatening to resort to self justice. On 10 and 29 January 2001, the Federal Attorney-General declared himself not competent to deal with the matter. In a personal letter dated 22 January 2001, a high-ranking official of the police directorate of South-eastern Hessia advised the author not to aggravate his own situation and to consider costs and prospects of a constitutional complaint carefully.

2.4 On 1 March 2001, the President of the Higher Regional Court of Frankfurt rejected the author's claim for damages for his legal costs, his out-of-pocket expenses and the costs related to his eviction, on the alleged ground that the judgements of the Regional Court of Darmstadt manifestly violated the law. He informed the author that Hessia was not liable for the judgements of its courts, unless the administration of justice constituted a criminal offence in a specific case.

2.5 On 27 March 2001, the Darmstadt public prosecutor's office decided not to investigate the charges brought by the author, in the absence of any indication of a criminal offence committed by the sitting judges of the Darmstadt Regional Court. Similarly, the author's application for legal aid, to appeal the decision of the public prosecutor, was rejected on 29 March 2001 for lack of reasonable prospect of success of this remedy. His appeal against the public prosecutor's decision was dismissed on 9 July 2001, and a further appeal on 4 January 2002.

2.6 On 20 April 2001, the author petitioned the Federal Minister of Justice and the Federal President to intervene in his case. When both petitions were rejected, the author engaged in exhibitionism in front of the Federal Ministry of Justice and threatened the office of the Federal President to set fire to himself. On 12 December 2001, the District Court of Berlin-Tiergarten convicted the author of trespassing for having climbed over the fence of the premises of the office of the Federal President. However, following a motion by the author, the penal order was set aside, after the District Court had ordered his psychiatric examination, to determine whether he could be held criminally responsible for the offence, and criminal proceedings were eventually discontinued.

2.7 Meanwhile, the author had lodged a disciplinary complaint with the Ministry of Justice of Hessia in relation to the public prosecutor's decision of 27 March 2001 to discontinue his case. On 30 July 2001, the chief prosecutor rejected the complaint. The author's appeal to the Higher Regional Court of Frankfurt was not accepted, in the absence of representation by a lawyer with capacity to conduct proceedings before that Court.

2.8 An arrest warrant was issued against the author on 4 August 2001, based on his failure to comply with the judgements of the Darmstadt Regional Court. By inter-agency mail dated 8 February 2002, the District Court of Offenbach instructed the police directorate of Offenbach to arrest the author, if he were not sent to a closed psychiatric institution. In

November 2002, the author was arrested after he had thrown various documents at the Federal President, during the latter's visit to Offenbach. Subsequently, the author unsuccessfully petitioned the Federal and the Hessian Parliaments, as well as the Federal Chancellor.

2.9 On 8 September 2003, the author lodged a constitutional complaint against the Hessian Attorney-General's decision of 1 August 2003 to reject a further appeal against the dismissal of his criminal charges against judges of the District Court of Offenbach and the Regional Court of Darmstadt. In particular, the author alleged that the requirement of legal representation for appealing this decision before a court was in violation of his constitutional right to access to the courts. On 17 November 2003, the Registry of the Federal Constitutional Court informed the author that it had registered his complaint, after it had already informed him on 24 October 2003 that the complaint would have to be declared inadmissible for lack of substantiation and for failure to exhaust judicial remedies and to comply with the prescribed time limit for submitting a constitutional complaint.

The complaint

3.1 The author alleges violations of his rights under articles 2, paragraph 3, 14, paragraph 1, 16, 17, 23, paragraph 1, and 26 of the Covenant, arguing that most of the proceedings initiated by him have been unduly prolonged, that his complaints were not seriously investigated, that his mail and telephone calls are being observed, and that his family's eviction from the apartment had adverse effects on his and his family's health.

3.2 The author claims that he was denied access to the courts and that he was prevented from exhausting domestic remedies, since he only had one month for lodging a constitutional complaint against the judgements of the Darmstadt Regional Court of 3 January 2001. During this time, he was unable to find a lawyer, partly due to the holiday period following New Year. Moreover, he was allegedly threatened with execution by the police, and with psychiatric as well as regular detention by the municipal hospital of Offenbach and, respectively, by the Offenbach District Court. Similarly, the author claims that none of the more than 40 lawyers contacted by him was willing to pursue his criminal complaint for perversion of justice, which reflects the de facto impunity of German judges.

3.3 The author claims compensation for his material damages and for the deterioration of his state of health.

Issues and proceedings before the Committee

4.1 Before considering any claims contained in a communication, the Human Rights Committee must, in accordance with article 87 of its rules of procedure, decide whether or not it is admissible under the Optional Protocol to the Covenant.

4.2 The Committee considers that, even assuming that the author's claims would not be inadmissible due to non-exhaustion of domestic remedies, they are inadmissible as the author has not been personally affected by an alleged violation of any provision of the Covenant and because they fall outside the scope of any of the provisions of the Covenant that he invokes, or because his claims have not been substantiated for purposes of admissibility.

5. The Human Rights Committee therefore decides:

(a) That the communication is inadmissible under articles 1, 2, 3 and 5, paragraph 2 (b), of the Optional Protocol;

(b) That this decision shall be communicated to the author and, for information, to the State party.

[Adopted in English, French and Spanish, the English text being the original version. Subsequently to be issued also in Arabic, Chinese and Russian as part of the present report.]

Note

[1] The International Covenant on Civil and Political Rights and the Optional Protocol entered into force for the State party respectively on 23 March 1976 and 25 November 1993.

Y. Communication No. 1239/2004, *Wilson v. Australia* (Decision adopted on 1 April 2004, eightieth session)*

Submitted by:	John Wilson (not represented by counsel)
Alleged victim:	The author
State party:	Australia
Date of communication:	20 March 2003 (initial submission)

The Human Rights Committee, established under article 28 of the International Covenant on Civil and Political Rights,

Meeting on 1 April 2004,

Adopts the following:

Decision on admissibility

1. The author of the communication, initially dated 20 March 2003, is John Wilson, an Australian citizen, born in 1942 and resident of Australia.[1] He claims to be a victim of a violation by Australia of articles 1, 2, 9, 14 and 17 of the Covenant. He is not represented by counsel.

The facts as presented by the author

2.1 The author claims that he has been involved in a number of different legal proceedings in the State of New South Wales which have been conducted unfairly, and which have denied him the right to a trial by jury. He claims that this has resulted in him being unlawfully imprisoned, unlawfully evicted from his premises, and defamed. He also claims that he has been the victim of what he described as the unlawful use of authority by a foreign power.

2.2 The author states that on 5 September 1997 he was arrested and charged with an offence under s326 of the *New South Wales Crimes Act 1900*, which criminalizes the making of threats to cause injury or detriment to a witness in a proceeding, a juror or a judicial officer (the author does not provide details of the charges against him or the surrounding circumstances).
On 26 September 1997 the author appeared in the Local Court, where he insisted on being tried by jury, to which the presiding Magistrate agreed.

2.3 On 17 November 1997, the author appeared in the New South Wales Supreme Court in response to a summons issued by the Prothonotary of that court, seeking to have the author charged with contempt of court. No details are provided, and it is unclear how or whether this charge related to those laid under the Crime Act. The author requested that his trial for contempt of court be by way of jury trial. The presiding judge refused this request. The author challenged this decision in the Supreme Court, but this was dismissed by a single judge of the court on 13 February 1998, and then by the Court of Appeal on 26 August 1998. The author's further application to the High Court of Australia for special leave to appeal against the refusal to grant a jury trial was dismissed on 16 April 1999.

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* The following members of the Committee participated in the examination of the present communication: Mr. Nisuke Ando, Mr. Prafullachandra Natwarlal Bhagwati, Mr. Alfredo Castillero Hoyos, Ms. Christine Chanet, Mr. Franco Depasquale, Mr. Maurice Glèlè Ahanhanzo, Mr. Walter Kälin, Mr. Ahmed Tawfik Khalil, Mr. Rafael Rivas Posada, Sir Nigel Rodley, Mr. Martin Scheinin, Mr. Ivan Shearer, Mr. Hipólito Solari Yrigoyen, Mr. Roman Wieruszewski and Mr. Maxwell Yalden.

2.4 The author claims that he was unlawfully imprisoned from 9 November 1999 to 28 February 2000 in the Silverwater Correctional Centre in Sydney, after being tried and convicted of contempt of court by the Supreme Court of New South Wales. No details of the circumstances surrounding his conviction are provided. He claims that he was denied his request for a trial by jury in relation to the contempt of court charges against him. On 28 February 2000, he was released from prison, following a successful appeal to the Court of Appeal. The author claims that the above circumstances reveal a breach of article 9 (5) of the Covenant.

2.5 The author states that on 28 December 2000, he filed proceedings against the St. George Bank in relation to allegations that the bank had committed fraud against him in relation to a housing loan contract, by including terms as to variable interest rates. The author's claim was also directed against the State of New South Wales, which, as the author argued, was "vicariously liable" for an earlier decision of a judge of the New South Wales Supreme Court. This decision had upheld an application by the bank to grant it possession of the author's house, in view of the author's default on loan repayments. The author claimed that the judge in the earlier matter had perverted the course of justice by not granting him a trial by jury in relation to the bank's claims against him. In his claim against the bank and the State of New South Wales, the author argued that he was entitled to a trial by jury, but this was rejected by a judge of the Supreme Court of New South Wales, and the author's subsequent appeals against this procedural decision in the New South Wales Court of Appeal and the High Court were dismissed on 16 November 2001 and 14 February 2003 respectively.

2.6 The author refers to 23 proceedings in which the relevant court refused his request for a jury trial, and claims that this reveals a violation by the State party of articles 2 and 14 of the Covenant.

2.7 The author further alleges that his proceedings against a media company in June 1997 for defamation, the circumstances of which are not explained, were unsuccessful, and that the Supreme Court of New South Wales struck out his claim despite the author's contention that his proceedings should be heard and determined by a jury. This is said to have amounted to a violation of article 17 by the State party.

2.8 The author also claims that, because the State party's judges and parliamentarians swear allegiance to Queen Elizabeth the Second, the monarch of a foreign State, it is in breach of article 1 of the Covenant.

2.9 Finally, the author claims that the failure of the State party's courts to uphold his claims against the aforementioned bank in relation to his loan contract constituted a violation of article 26, as he was denied the protection of the law against what he claims to have been the bank's fraudulent practices.

The complaint

3.1 The author contends that, in the various legal proceedings referred to in his communication, he was not afforded a trial by jury, and that the proceedings were not conducted fairly, in violation of articles 9 and 14. He also claims that the conduct complained of amounted to breaches of articles 1, 2, 17 and 26 of the Covenant.

Issues and proceedings before the Committee

4.1 Before considering any claim contained in a communication, the Human Rights Committee must, in accordance with the rule 87 of its rules of procedure, decide whether or not the case is admissible under the Optional Protocol to the Covenant.

4.2 The Committee has ascertained, as required under article 5, paragraph 2 (a), of the Optional Protocol, that the same matter is not being examined under another procedure of international investigation or settlement.

4.3 The Committee reiterates its position that an individual cannot claim the status of "victim" in respect of alleged violations of the right of all peoples to self-determination, as enshrined in article 1 of the Covenant.[2] Consequently, this part of the communication is inadmissible under article 1 of the Optional Protocol.

4.4 As to the author's claims under articles 2, 9, 14, 17 and 26 of the Covenant, the Committee considers that they either fall outside the scope of those provisions or have not been substantiated, for purposes of admissibility. The Committee observes, in particular, that the Covenant does not confer the right to trial by jury in either civil or criminal proceedings, rather the touchstone is that all judicial proceedings, with or without a jury, comport with the guarantees of fair trial.[3] Consequently, the author's claims are inadmissible under articles 2 and 3 of the Optional Protocol.

5. The Committee therefore decides that the communication is inadmissible. The decision will be transmitted to the author and, for information, to the State party.

[Adopted in English, French and Spanish, the English text being the original version. Subsequently to be issued also in Arabic, Chinese and Russian as part of the present report.]

Notes

[1] The Optional Protocol entered into force in relation to Australia on 25 December 1991.

[2] See, for example, *Hom v. The Philippines*, case No. 1169/2003, decision adopted on 8 August 2003.

[3] See, for example, *Kavanagh v. Ireland* (No. 1), case No. 818/1998, Views adopted on 4 April 2001.

Z. Communication No. 1272/2004, *Benali v. The Netherlands* (Decision adopted on 23 July 2004, eighty-first session)*

***Submitted by*:**	**Ms. Fatima Benali (represented by counsel, J.J.C. van Haren)**
***Alleged victim*:**	**The author**
***State party*:**	**The Netherlands**
***Date of initial communication*:**	**23 June 2003 (initial submission)**

***The Human Rights Committee*, established under article 28 of the International Covenant on Civil and Political Rights,**

***Meeting* on 23 July 2004,**

***Adopts the following*:**

Decision on admissibility

1.1 The author of the communication, initially dated 23 June 2003, is Ms. Fatima Benali, a Moroccan national born in Morocco on 13 July 1984. She argues that for the Netherlands to remove her to Morocco would amount to a breach of articles 17, 23 and 24 of the Covenant. The author is represented by counsel.

1.2 On 29 June 2004, the Committee, acting through its Special Rapporteur on new communications, decided to separate consideration of the admissibility and merits of the communication.

The facts as presented by the author

2.1 In 1985, the marriage of the author's parents, living in Morocco, was dissolved. Her mother moved out of the family home, where the author continued to live with her father. In August 1989, the author's father remarried. Between 1989 and 1990, the author's mother also remarried and lived in a village some 50 kilometres removed from the author, who lived with her paternal grandmother. The author contends that, according to local cultural rules, her mother

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*** The following members of the Committee participated in the examination of the present communication: Mr. Abdelfattah Amor, Mr. Nisuke Ando, Mr. Prafullachandra Natwarlal Bhagwati, Ms. Christine Chanet, Mr. Walter Kälin, Mr. Rajsoomer Lallah, Mr. Rafael Rivas Posada, Sir Nigel Rodley, Mr. Martin Scheinin, Mr. Ivan Shearer, Mr. Hipólito Solari Yrigoyen, Ms. Ruth Wedgwood, Mr. Roman Wieruszewski and Mr. Maxwell Yalden.**

joined completely the family of her new husband and left her own family. She accordingly withdrew both de facto and legally from the care of the author, stating in an "*acte de remise d'enfant*" that she transferred the author's care to her father. In 1990, the author's father moved to the Netherlands with his new wife. It is said, however, that her father maintained contact with her, took decisions concerning her education in consultation with her grandmother and provided money for her education and care. In 1995, the paternal grandmother moved to France, but according to applicable French law it was allegedly not possible for the author to join her. Instead, on 1 September 1995, she travelled separately to her father in the Netherlands.

2.2 On 12 September 1995, the author applied to the Dutch authorities for a residence permit to stay with her father, residing in the Netherlands. On 2 June 1997, the Secretary of Justice refused the application. On 18 May 1998, the Secretary of Justice rejected the author's application that the previous decision was invalid.

2.3 On 22 January 1999, the District Court dismissed the author's appeal against the decision of the Secretary of Justice. The Court observed that domestic law provided for a residence permit to allow for family reunification arising from a family relationship pre-existing a parent's arrival in the Netherlands. Such a claim fails, however, if the family relationship had been dissolved, such as by permanent assimilation of a child into another family whereby the initial parents no longer exercise parental authority or provide for the child's expenses. The claim also becomes more difficult the longer the period of separation has continued. In the Court's view, it was not probable that the author's father leaving her behind in 1990 with her grandmother's family for five years was seen as a temporary measure and that he had from the beginning intended her to join him in the Netherlands. The Court considered, on the contrary, that the decision to bring the author to the Netherlands was more probably prompted by the move of her grandmother to France in 1995. In light of all the facts, the Court found the relationship had come to an end when her father left Morocco.

2.4 On the claim that the author nonetheless should be permitted to remain in the Netherlands on sufficiently urgent humanitarian grounds, the Court considered that unreasonable hardship in the event of a return had not been shown. Nor had it been shown that she had become so integrated into Dutch society, and so alienated from Moroccan society, that residence outside the Netherlands would be inconceivable and "so distressing" that she should be permitted to remain. Assessing the claim under the protection of family life afforded under article 8 of the European Convention on Human Rights, the Court found, on the above assessment of the facts, that no interference in family life had been made out. Nor had the author made out any positive obligation on the State in the circumstances to allow her to remain. No objective impediment to continuing to enjoy family life in Morocco had been shown. As a result, after weighing the competing factors, the Court found that the decision had been arrived at "in all reasonableness" and was not inconsistent with any general principle of sound and proper administration.

2.5 Since that point, the author has continued to live in the Netherlands and it is said that no action to remove her has been initiated.

The complaint

3.1 The author argues that to remove her to Morocco would amount to arbitrary or unlawful interference with her family and home, contrary to article 17 of the Covenant, and would breach her right to protection as a minor, contrary to article 24 of the Covenant. She also alleges, without any argumentation, a violation of article 23 of the Covenant.

3.2 The author contends that in Morocco there is no person who could take care of her. It is argued that her father cannot be expected to return there to care for her as his wife has lived in the Netherlands since 1980 and does not wish to return. The author states that she has joined school in the Netherlands and is completely integrated in Dutch society, speaking the language fluently.

Submissions by the State party on the admissibility of the communication

4. By submission of 28 June 2004, the State party argues that the communication is inadmissible for failure to exhaust domestic remedies, arguing that after lodging the communication the author submitted a renewed request for a residence permit to the immigration authorities. That request was rejected on 21 April 2004, upon which the author filed an objection to the District Court accompanied by a request for a provisional measure that she not be expelled pending the Court's proceedings. A date for hearing has not yet been set.

The author's comments on the State party's submissions

5. By letter of 13 July 2004, the author responded to the State party's submissions, arguing that she submitted a new (as opposed to "renewed") request for a residence permit, but that the objection has been filed with immigration authorities rather than with the District Court. She concedes that a request for provisional measures pending the objection proceedings has been filed. She argues that all domestic proceedings regarding the particular request have been exhausted, a fact not altered by the filing of a new request with other argumentation. The new request argues that since her arrival in the Netherlands in 1995 and since the final decision of the District Court in 1999 no attempt was made to remove her, and that it would thus be a policy of "toughness" to remove her at the present time. The author thus concludes that the communication should be declared admissible.

Issues and proceedings before the Committee

Consideration of admissibility

6.1 Before considering any claim contained in a communication, the Human Rights Committee must, in accordance with rule 87 of its rules of procedure, decide whether or not the communication is admissible under the Optional Protocol to the Covenant.

6.2 The Committee observes, with respect to the claim under article 24, that as the author is at the present time no longer a minor, then, regardless of what may have been the position at an earlier point in time, any future removal would not implicate any rights under this article. This claim is thus inadmissible *ratione materiae* under article 3 of the Optional Protocol as incompatible with the provisions of the Covenant.

6.3 As to the claims under articles 17 and 23, the Committee refers to its jurisprudence that the removal of one or more family members from a State party to another country may, in principle, raise arguable issues under these provisions of the Covenant.[1] The Committee observes however that the issues which the author, by her own action, has presented to the authorities in her renewed application, are of substantial import to any decision of the Committee on these claims, as the Committee's decision would be based on assessment of the author's situation as it stands at the time of decision. The Committee refers to its jurisprudence that, where an author has lodged renewed proceedings with the authorities that go to the substance of the claim before the Committee, the author must be held to have failed to exhaust domestic remedies as required by article 5, paragraph 2 (b), of the Optional Protocol.[2] The Committee thus declares the communication inadmissible on this basis.

7. Accordingly, the Committee decides:

(a) That the communication is inadmissible under articles 3 and 5, paragraph 2 (b), of the Optional Protocol; and

(b) That this decision will be transmitted to the author and, for information, to the State party.

[Adopted in English, French and Spanish, the English text being the original version. Subsequently to be issued also in Arabic, Chinese and Russian as part of the present report.]

Notes

[1] See, for example, *Winata v. Australia*, case No. 930/2000, Views adopted on 26 July 2001, and *Sahid v. New Zealand*, case No. 893/1999, Views adopted on 28 March 2003.

[2] See *Barov v. The Phillipines*, case No. 1045/2002, decision adopted on 31 October 2003, and *Romans v. Canada*, case No. 1040/2001, decision adopted on 9 July 2004.

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